IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1417

BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD

-and-

THE BOEING COMPANY

No. 71-1607

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

versus

THE BOEING COMPANY, ET AL.

On Petitions for Writs of Certiorari To The United States Supreme Court of Appeals For the District of Columbia Circuit

BRIEF FOR THE BOEING COMPANY, IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

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BRIEF FOR THE BOEING COMPANY, IN OPPOSITION

Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO (the Union), and the Solicitor General, on behalf of the National Labor Relations Board (the Board), seek review of the same judgment which The Boeing Company is seeking to have reviewed by its petition in *The Boeing Company v. National Labor Relations Board and Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO*, No. 71-1563. (*Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO v. N.L.R.B.* and *The Boeing Company v. N.L.R.B.*, 459 F. 2d 1143, C.A., D.C., 1972).

In No. 71-1563, *The Boeing Company v. National Labor Relations Board and Booster Lodge No. 405, International Association of Machinists and Aerospace Workers*, The Boeing Company has presented the following question:

> Whether a union committed an unfair labor practice under Section 8(b) (1) (A) of the National Labor Relations Act and engaged in conduct to "restrain or coerce" employees in the exercise of their rights under Section 7 of the Act to "refrain from" concerted activities, where such union imposed fines on, and attempted to collect such fines from, employees who came through the Union's picket lines, regardless of whether or not such employees had resigned their union membership and regardless of whether or not the fines related to the period before, or the period after, resignation.

The Boeing Company submits that the question presented by it should be answered in the affirmative, and that the Court should reverse its decision in *N.L.R.B. v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967). Were this to occur, and The Boeing Company respectfully urges the Court to take such action, the questions sought to be presented by the Board and the Union, stated below, would become moot. The remainder of this brief is addressed to issues that exist if, and only if, the Court declines to take such action.

In No. 71-1417, *Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO v. National Labor Relations Board and The Boeing Company*, the Union seeks to present the following questions:

> 1. Whether a member of a union may escape union discipline, exerted by the levy of a court-collectible fine, for violation of his union obligation to refrain from strikebreaking by resigning from his union subsequent to the commencement of a strike and engaging in strikebreaking after his resignation.
>
> 2. Whether the National Labor Relations Board is empowered to determine the reasonableness of a fine assessed by a union against a member for violating its valid rule against strikebreaking.

In No. 71-1607, *National Labor Relations Board v. The Boeing Company Et Al.*, the Board seeks to present the following question:

Whether the National Labor Relations Board, in determining whether a union committed an unfair labor practice by assessing and seeking court collection of a fine against a member for violating a union rule against strikebreaking, is required to determine whether the fine is reasonable in amount.

OPINIONS BELOW

On February 18, 1966, The Boeing Company filed a charge with the National Labor Relations Board alleging that the Union had violated Section 8(b) (1) (A) of the National Labor Relations Act,[1] and a complaint was issued by the Board's General Counsel. The Labor Board decided that the Union violated Section 8(b) (1) (A): (1) by fining employees who had resigned from the Union before they returned to work during the strike, and (2) by disciplining those employees who resigned after returning to work to the extent that the fines were imposed for their working during the strike after their resignations (App. 9a-10a).[2] The Labor Board further found that the Union did *not* violate the Act (1) by fining members for crossing the picket line to work during the strike who did not resign from the Union, and (2) by fining those employees who had resigned after returning to work during the strike for

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[1] 29 U.S.C. Section 158(b)(1)(A).

[2] As stated above, in No. 71-1563, The Boeing Company filed a Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit. To avoid needless duplication, we have not reprinted the material contained in the petition in No. 71-1563; the "App." references contained herein are to that appendix.

work they performed during the strike prior to their resignations. (App. 10a). 185 NLRB No. 23.

Both the Union and The Boeing Company filed petitions to review the Board's decision and order with the Court of Appeals for the District of Columbia Circuit pursuant to 29 U.S.C. Section 160(f). The Court of Appeals sustained the foregoing findings of the Board (App. 5a and 10a). However, the Board had also held that the legality of union fines does not depend upon their reasonableness, and it did not adopt the Trial Examiner's findings, conclusions and recommendations on that issue. App. 42a, ftn. 16; App. 62a-107a.[3] The Court of Appeals disagreed with the Board in this respect, and remanded the case for further proceedings in conformity with its views as set out in its opinion. App. 22a-30a; App. 33a.

THE PETITIONS IN NOS. 71-1417 AND 71-1607 SHOULD BE DENIED

The Boeing Company submits that the question presented by its petition in No. 71-1563 should be answered in the affirmative. Should that question be answerd in the affirmative, the questions presented by the Union's petition and by the Board's petition become moot. In any event, however, the petitions filed by the Union and the Board should be denied.

Because of the similarity of the question the Board seeks to present and the second question which the

[3]One Board member dissented in this regard. App. 42a, ftn. 16.

Union seeks to present, that question will be argued first herein, and then the first question which the Union seeks to present will be argued.

1. Assuming, arguendo, that a union is not precluded by Section 7 of the National Labor Relations Act from fining its members for crossing a picket line, the reasonableness of the amount of the fine is a matter to be determined by the National Labor Relations Board.

If this Court is going to continue to permit unions to impose disciplinary fines on employees who work during a strike, then the holding of the court below that "the imposition of an unreasonably excessive disciplinary fine is a violation of Section 8(b) (1) (A)", and that "it is clearly the obligation of the National Labor Relations Board to resolve the question of reasonableness where such an issue is appropriately raised" (App. 25a), is a correct and valid interpretation of the law, particularly in the light of this Honorable Court's opinions in *N.L.R.B. v. Allis-Chalmers Manufacturing Company*, 388 U.S. 175 (1967) and in *Scofield v. N.L.R.B.*, 394 U.S. 423 (1969).

In its decision, the Labor Board relied upon a companion case, *International Association of Machinists and Aerospace Workers, Local No. 504*, 185 NLRB No. 22, 75 LRRM 1008 (1970). Appeal of which is now pending before the Court of Appeals for the Ninth Circuit,

sub nom. David O'Reilly v. N.L.R.B., No. 26,892.[4]

In the instant case, neither before nor during the strike did the Union warn employees that fines or any other action would be taken against those who worked during the strike. App. 7a-8a. After the strike had ended, the sum of $450.00 was arbitrarily determined to be the amount of the fine imposed. App. 53a-53b. The record discloses that the suits filed by the Union were for $630.00 "with legal interest". The figure of $630.00 was based upon $450.00 for the fine, plus $180.00 attorney's fees. App. 55a. The fines were imposed upon employees without regard to whether or not they had resigned from the Union. It was the position of the Union that under its Constitution members could not resign, except "by death". App. 62a; App. 40a, n. 11; App. 72a. Fines had never been levied on members of the Union before for any reason. App. 99a.

The court below stated:

> "The Board's belief that it does not have the obligation of examining the reasonableness of union fines in Section 8(b) (1) (A) proceedings is based upon a clear misconception of the law and the Supreme Court's relevant decisions."[5]

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[4]See No. 71-1417, *Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO v. National Labor Relations Board and The Boeing Company*, App. 47a *et seq.* to the petition therein.

[5]App. 23a.

The Court of Appeals considered and flatly rejected the Board's attempt to defer to state courts the adjudication of internal union disputes. As the court noted, the possible existence of a concurrent state court remedy does not relieve the Board of its duty to adjudicate and remedy unfair labor practices under the Act. The court also pointed out the reluctance of state courts to become embroiled in internal union affairs, the compelling need for uniformity, the relative inaccessibility of state courts as compared with the National Labor Relations Board, and the inconsistency between the Board's position and the preemption doctrine.

That the Board must determine the question of reasonableness of union disciplinary fines is made clear from this Court's earlier decisions. In *N.L.R.B. v. Allis-Chalmers Manufacturing Company, supra,* at 183, this Court stated:

> "Where the union is strong and membership therefore valuable, to require expulsion of the member visits a far more severe penalty upon the member than a *reasonable fine.*" (Emphasis supplied).[6]

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[6]Justice White, in his concurring opinion, observed:

> [S]ince expulsion in many cases — certainly in this one involving a strong union — be a far more coercive technique for enforcing a union rule and for collecting a *reasonable fine* than the threat of court enforcement, there is no basis for thinking that Congress, having accepted expulsion as a permissible technique to enforce a rule in derogation of Section 7 rights, nevertheless intended to bar enforcement by another method [court action] which may be far less coercive.

This Court again expressly imposed the sanction against fines which are not reasonable in *Scofield v. N.L.R.B., supra,* 394 U.S. at 428, 430 and 436. Further support for the decision of the court below is found in the language of the court in *National Cash Register Co. v. N.L.R.B.,* ____ F. 2d, ____, 81 LRRM 2001, 2008-9, C.A. 6, 1972.

The refusal of the Board to consider whether the assessment of unreasonable fines is an unfair labor practice in violation of Section 8(b) (1) (A) rested on two grounds. The first was statutory, the Board stating that the National Labor Relations Act "does not authorize this Board to evaluate the fairness of union discipline meted out to protect a legitimate union interest." The second ground was the Board's interpretation of footnote 32 and its accompanying text in the *Allis-Chalmers* decision.[7] In essence, the Board held that it does not have the statutory authority to evaluate the fairness or reasonableness of union discipline, and that allegations concerning the unreasonableness of union discipline can be raised only in state court proceedings for enforcement of the discipline imposed.

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388 U.S. at 198 (emphasis supplied). It is also informative to note the express interpretation given to the *Allis-Chalmers* opinion by the dissenting members of the Court: "[T]he Court's holding boils down to this: a court-enforced *reasonable fine* for nonparticipation in a strike does not 'restrain or coerce' an employee in the exercise of his right not to participate in the strike." 388 U.S. at 200-201 (dissenting opinion of Black, J.) (emphasis supplied).

[7] 388 U.S. 175, 193 and n. 32.

Contrary to the Board and the Union, we submit that the Board not only has the statutory authority to determine the fairness of union discipline, but also a specific *mandate* to do so under this Court's holdings in *Allis-Chalmers* and *Scofield*. In *Allis-Chalmers* and *Scofield* this Court interpreted the imprecise terms "restrain or coerce" of Section 8(b) (1) (A) and established, in clear terms, standards by which union discipline must be measured against the statutory proscription. As the Court noted in *Scofield*, there was "no showing in the record that the fines were unreasonable or the mere fiat of the union leader. . . ."[8] Thus, the Court ruled in *Scofield*, "the union rule is valid and . . . its enforcement by *reasonable fines* does not constitute restraint or coercion proscribed by Section 8(b) (1) (A)."[9] (Emphasis supplied).

This Court has clearly indicated that, in evaluating union disciplinary action against employees under Section 8(b) (1) (A), among the factors the Board must examine in addition to the validity of the union rule, is the reasonableness of the sanction imposed upon the employees. There is nothing in this Court's decisions nor in the Act itself which precludes the Board from considering reasonableness in determining the lawfulness of union discipline within the meaning of Section 8(b) (1) (A).

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[8] 394 U.S. 423, 430.

[9] 394 U.S. 423, 436. See also, Silard, *Labor Board Regulations of Union Discipline After Allis-Chalmers, Marine Workers and Scofield*, 38 Geo. Wash. L. Review 187, 190 (1969).

The Board seeks to avoid the clear mandate of the *Scofield* decision by reliance upon a footnote in the *Allis-Chalmers* decision and its own conclusion that the local courts are the more logical tribunals for the establishment of standards of reasonableness. Board's petition, page 9, footnote 10. That the Board's reliance on the *Allis-Chalmers* footnote is misplaced is clear from the holding in both *Allis-Chalmers* itself as well as this Court's decision in *Scofield*. In the footnote, the Court stated (388 U.S. at 193, n. 32):

> It has been noted that the state courts, in reviewing the imposition of union discipline find ways to strike down 'discipline [which] involves a severe hardship.'

As can be seen there is no indication or even implication in the footnote to suggest that the Court removed the reasonableness of discipline from the Board's scrutiny when resolving cases under Section 8(b) (1) (A). Indeed, the inference the Board should have drawn was to the contrary; the Court dwelled on *"reasonable"* fines, implying a limitation inherent in Section 8(b) (1) (A).

It is inherently unlikely that this Court would have so carefully and repeatedly articulated the requirement that union disciplinary fines be *reasonable* if it meant only to encourage the exercise of the equity jurisdiction of state courts. Moreover, not once has this Court intimated that the Board should *not* consider the reasonableness of the discipline imposed in evaluating union conduct in relation to Section 8(b) (1) (A) of the Act.

In the light of the legislative and interpretive history of Section 8(b) (1) (A), the only logical conclusion to be drawn from the *Allis-Chalmers* and *Scofield* decisions is that the requirement of reasonableness is one critical factor on the scales outlined by the Court which measure the balance between the practical needs of labor organizations, especially during strikes, and the reach of employees' Section 7 right to refrain from striking. Apart from the *Scofield* holding, however, we submit that even cursory consideration of the central position of the Board in the formulation of national labor policy demonstrates the requirement that the Board resolve the issue of reasonableness in determining whether union disciplinary action violates Section 8(b) (1) (A) of the Act.

It was the purpose of Congress in establishing the Board to have *one* agency for the adjudication of issues arising from labor disputes.[10] Only recently, this Court has reaffirmed the "primary responsibility" of the Labor Board for guiding the development of national labor policy.[11] To support the Board's preeminent position in the scheme of national labor policy, the Court in *San Diego Building Trades Council v. Garmon*,[12] set forth the preemption doctrine:

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[10] *Myers v. Bethlehem Shipbuilding Corporation*, 308 U.S. 41 (1938); *Amalgamated Utility Workers v. Consolidated Edison of New York*, 309 U.S. 261 (1940).

[11] *N.L.R.B. v. Raytheon Company*, 398 U.S. 25, 28 (1970).

[12] 359 U.S. 236 (1959).

> "When an activity is arguably subject to Section 7 or Section 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."[13]

In such situations, the "power and duty of primary decision lies with the Board," rather than with one or several other tribunals, for the sensible reason that "[a] multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."[14] Congressional concern for a coherent national labor policy naturally manifests itself in a corollary interest in "uniform application of its substantive rules [avoiding] diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies."[15]

The desirability of uniformity, the basis for the preemption doctrine in the labor law area, is especially strong in cases like the instant one. Not only is the assessment of an unreasonably large disciplinary fine "arguably" an unfair labor practice within the terms of Section 8(b) (1) (A) of the Act, but the resolution of the reasonableness issue in this case is essential

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[13]359 U.S. 236, 245. Accord, *International Longshoremen's Local 1416, AFL-CIO v. Ariadne Shipping Company*, 397 U.S. 195, 200 (1970).

[14]*Garner v. Teamsters Union*, 347 U.S. 485, 489, 490-91 (1953).

[15]*San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243, quoting *Garner v. Teamsters Union*, 346 U.S. 485, 490.

to the clarification of union disciplinary powers under the Act. To abstain from deciding the question is to deny that the Court in *Allis-Chalmers* and in *Scofield* has restricted union action within the bounds of reasonableness where the discipline affects employees' Section 7 rights. To leave the decision of the limits of union action under Section 8(b) (1) (A) to case-by-case adjudication in state courts is to invite precisely that conflict of substantive rules of law repugnant to federal labor policy. We cannot believe that, although the Supreme Court decided in *Garmon* that "to allow the States to control which is the subject of national regulations (sic) would create potential frustration of national purposes," it would now, as the Board and the Union suggest, leave to the state courts a decision so vital to a uniform national labor policy as the permissible infringement of employees' Section 7 rights by labor organizations.[16] Having described "the multitude of activities regulated by Sections 7 and 8 of the National Labor Relations Act" as "one of the most teasing and frequently litigated areas of industrial relations," we cannot be led to believe that this Court would leave to the myriad state courts the task of balancing union and employee interests under the Act.[17] Indeed, this Court has clearly stated that "the unifying consideration of our decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumula-

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[16] 359 U.S. 236, 244.
[17] 359 U.S. 236, 241.

tive experience . . ." (359 U.S. at 242). Thus, the Board's determination to abstain from deciding the question of the reasonableness of the fine assessed in this case in favor of adjudication by the state courts is a renunciation of its role in the formulation and administration of federal labor policy, and completely contrary to this Court's mandate in *Garmon, Allis-Chalmers* and *Scofield.*

Thus, if we are to assume that a union has any power whatever to discipline employees for voluntarily crossing a picket line, there is absolutely no support for the arguments of the Board and the Union that the Act does not allow the Board to consider reasonableness as a factor in determining whether union discipline conflicts with the proscriptions of Section 8(b)(1)(A) of the Act. Such a conclusion certainly cannot be drawn from the legislative history, this Court's interpretation of the Act, nor from the proviso to the Section.[18] Indeed, the Board's conclusion flies in the face of explicit indications in *Scofield* and *Allis-Chalmers* to the effect that lawful union discipline depends, in part, on the reasonableness of the punishment imposed.

It is submitted that if "reasonable" fines may be imposed, as previously contemplated by the Court in *Allis-Chalmers* and in *Scofield,* then the Board, with its expertise, is the proper tribunal to determine the reasonableness of the amount of the fine. We submit that the opinion of the court below is consistent with

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[18]The proviso does not apply where union conduct restrains and coerces the exercise of Section 7 rights, for no matter what internal union interest is involved, it must yield to the overriding statutory freedoms of the employees.

the dissenting opinion of then Chairman McCulloch in *International Association of Machinists and Aerospace Workers, AFL-CIO, Local Lodge No. 504 (Arrow Development Company)*, 185 NLRB No. 22, 75 LRRM 1008. Chairman McCulloch stated (75 LRRM at 1011-14):[19]

> "I am unable to agree with the conclusion of my colleagues that the reasonableness of the amount of a court-collectible fine imposed on a union member for failure to honor his union's picket line during a strike is not relevant to a determination of whether Section 8(b)(1)(A) of the Act has been violated. In my view the Supreme Court decisions cited by the majority do not command the result they reach, but rather support an opposite conclusion.
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> In neither of the cited cases, as the Court was careful to note, was any contention made that the fines were unreasonable in amount. As the question of reasonableness was therefore not directly before the Court, it was not squarely ruled upon. There are, however, clear indications in these decisions, when read together, that a majority of the Court likely would have come to a different result had it appeared in those cases that the fines imposed were unreasonable in amount.
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> In Allis-Chalmers, the opinion for the Court was joined in fully by four justices; Mr. Jus-

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[19] Footnotes omitted. See also App. 58a *et seq.* to the petition of the Union in No. 71-1417.

tice White wrote a separate concurring opinion in which, while agreeing generally with the opinion of the Court, he expressed doubts 'about the implications of some of its generalized statements'. Four other justices joined in the dissenting opinion written by Mr. Justice Black. In holding that the imposition of court-enforced fines for crossing a union picket line was outside the intended reach of Section 8(b)(1)(A), the Court, in the course of its principal opinion, at several points used the term 'reasonable fine'. Thus, at page 183 it stated:

> Where the union is strong and membership therefore valuable, to require expulsion of the member visits a far more severe penalty upon the member than a *reasonable fine*. (Emphasis original).

* * * *

The Court's repeated use of the adjective 'reasonable' in both Allis-Chalmers and Scofield to describe the fines there in issue cannot be passed over casually as without significance. By its carefully drawn distinction between 'reasonable' and 'unreasonable' fines, the Court, it seems to me, meant not only to define the limits of its holdings in these cases, but also to indicate affirmatively that it regarded

court-collectible fines which were unreasonable, either in their nature or size, as not serving a legitimate union interest, and therefore not privileged from the proscriptions of Section 8(b) (1) (A).

Support for the view that the Supreme Court did not read the Act and its legislative history as removing 'unreasonable' fines from the reach of Section 8(b) (1) (A) is to be found in the language from Scofield, quoted above, wherein the Court outlined the test that 'must be applied'."

Chairman McCulloch further stated:[20]

"Other policy considerations also favor the result I would reach. Thus, to leave an employee to his remedy from a state court might well leave him without any effective relief at all, for the cost of attorney fees alone in many cases will discourage attempts to defeat fines that are excessive. Moreover, I believe this is an area in which uniformity is desirable. Courts are likely to differ widely in their appraisal of what is or is not excessive, and the Board is in the best position to develop fair and uniform standards that are likely to gain general acceptance."

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[20] *Id.* at 113-14.

In *N.L.R.B. v. Radio and Television Broadcast Engineers Union*, 364 U.S. 573 (1961), the Court, in rejecting the Board's contention that it should not make an affirmative award of work under Section 10(k) of the Act, since Congress failed to set forth standards to guide it in determining jurisdictional disputes on their merits, said that given the Board's experience in handling similar labor problems, "the Board need not disclaim the power given it for lack of standards."[21] Since that decision, the Board has developed "standards" for making affirmative awards in jurisdictional disputes. See, e.g., *IBEW Local 743*, 185 NLRB No. 106, 75 LRRM 1164 (1970). Just recently the Board exercised its experience and concluded that a union violated Section 8(b)(5) of the Act[22] by imposing excessive initiation fees which, according to the Board, restrained and coerced employees in their right to join the union. In so doing, the Board pointed to such factors as the fee being six times greater than the weekly wage of employees belonging to the union, and that it was twice as large as that of the union's sister local. *Longshoremen, I.L.A., Local 1419*, 186 NLRB No. 94, 75 LRRM 1411 (1970).[23] The Board can just as well exercise its experience in determining whether or not fines are "reasonable", if fines are to be permitted in such cases.

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[21] 364 U.S. at 583.

[22] 29 U.S.C. Section 158(b)(5).

[23] See also *N.L.R.B. v. Television & Radio Broadcasting Studio Employees*, 315 F. 2d 398, CA 3, 1968.

2. Assuming, arguendo, that a union is not precluded by Section 7 of the National Labor Relations Act from fining its members for crossing a picket line, a member may not be so fined if he resigns from the union before or during a strike called by the union.

Again, it is the position of The Boeing Company that all fines levied by unions against employees for exercising their statutory right under Section 7 of the Act to refrain from engaging in concerted activities by working during a strike restrain or coerce employees in violation of Section 8(b) (1) (A). The Board, relying primarily on *Allis-Chalmers* and *Scofield, supra,* has concluded that a union violates the Act only when fines are imposed on former members for their post-resignation conduct.

The Court of Appeals, in agreement with the Board, affirmed the conclusion that "the Union violated Section 8(b) (1) (A) by imposing fines upon employees, and by threatening or attempting enforcement of such fines, because of those employees' *post-resignation* conduct in working at the Company plant during the authorized work stoppage". The court below included in this finding the Union's effort not only to discipline those employees who had resigned from membership before engaging in any strike-breaking, but also the Union's imposition of fines on those who resigned during the period of their strikebreaking, to the extent that such discipline was imposed as a result of their post-resignation conduct. The court below noted that "since the imposition of fines under such circumstan-

ces violated the policies underlying the National Labor Relations Act and had effects outside the area of internal Union affairs, they were clearly 'coercive' within the meaning of Section 8(b)(1)(A)". The court further noted that the fact that the fines might not have been collectible in a subsequent collection suit does not detract from the fact of their coerciveness at the time they were imposed.[24]

This court, on March 20, 1972, granted the Board's petition for certiorari in *National Labor Relations Board v. Granite State Joint Board*, No. 71-711, wherein the Court of Appeals for the First Circuit dealt with the post-resignation question.[25] In *Granite State*, in denying enforcement of the Board's order, the Court of Appeals for the First Circuit noted that *Granite State* may be critically distinguishable from the instant case.[26] In the instant case, the court below embraced the distinctions suggested by the First Circuit and stated that "we believe that the [*Granite State*] decision is inapposite to the present fact situation."[27] The court below also stated, "To the extent that the First Circuit's decision in *Granite State* may be read to support Booster Lodge 405's position here, we respectfully decline to follow it."[28] The Union here, in

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[24]App 21a. See also App. 39a-42a.

[25]*N.L.R.B. v. Granite State Joint Board, Textile Workers Local 1029*, 446 F. 2d 369, C.A. 1, 1971.

[26]446 F. 2d 369, 372, n. 5.

[27]App. 18a.

[28]App. 19a, n. 19. The First Circuit's opinion in *Granite State* has received other criticism, See, e.g. Note, 46 Tul. L. Rev. 848, 850-55 (1972).

2. Assuming, arguendo, that a union is not precluded by Section 7 of the National Labor Relations Act from fining its members for crossing a picket line, a member may not be so fined if he resigns from the union before or during a strike called by the union.

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[26]446 F. 2d 369, 372, n. 5.

[27]App. 18a.

[28]App. 19a, n. 19. The First Circuit's opinion in *Granite State* has received other criticism, See, e.g. Note, 46 Tul. L. Rev. 848, 850-55 (1972).

its petition, recognizes the distinction between this case and *Granite State*. No. 71-1417; Petition, pages 13-14.

Here, the Company and the Union were parties to a collective bargaining agreement which expired on September 15, 1965. Upon the expiration of the contract, the Union commenced a strike against Boeing and began picketing at the Company's Michoud, Louisiana plant, as well as at various other locations. This work stoppage lasted 18 days. On October 2, 1965, a new collective bargaining agreement was signed and the strike ended. App. 6a-7a; 35a. Both the expired and the newly executed agreements contained maintenance-of-membership clauses which required all new employees to notify both the Union and the Company within 40 days after their employment began if they elected not to become members of the Union. It also required that those who became members retain their membership *only during the contract term*. App. 7a; 35a.

During the strike period, after the contract had expired, approximately 143 out of approximately 1900 production and maintenance employees then represented by the Union at the Michoud plant crossed the picket line and reported to work. All of those persons had been members of the Union during the 1963-65 contract period. Some of the employees who worked during the strike made no attempt to resign from the Union during the strike. Approximately 119 submitted their voluntary resignations, in writing, both to the Union and the Company. About 61 employees who resigned did so *before* they crossed the picket line and

returned to work. Another 58 also resigned during the course of the strike, but *after* they had returned to work. However, all resignations were submitted after the expiration of the 1963-65 contract, and before the execution of the new contract, and all were submitted prior to the imposition of any Union disciplinary action, or any threats or warnings of same. Union members were not warned prior to the strike that disciplinary measures could, would, or might be taken against those who crossed the picket line to work. In fact, nc disciplinary action had been imposed on members by Booster Lodge No. 405 prior to that time. App. 7a-8a; see also page 7, *supra*.

In late October or early November of 1965, the Union notified all members and former members who had crossed the picket line and worked during the strike that charges had been preferred against them under the International Union Constitution for "Improper Conduct of a Member" due to their having "accept[ed] employment ... in an establishment where a strike exist[ed]." They were advised of the dates of their Union trials, which were to be held even in their absence if they did not appear, and they were notified of their right to be represented by counsel, *provided* the said counsel was a member of the International Association of Machinists and Aerospace Workers. Under the provisions of the National Union Constitution which permitted the imposition of disciplinary measures, including "reprimand, fines, suspension, or lesser penalty or combination", where a member had been found guilty of misconduct after notice and a hearing, fines were imposed on *all* employ-

ees who had worked during the strike. No distinction was drawn between those employees who had resigned from the Union before returning to work, after returning to work, and those who had not resigned at all. The Union sent out notices to the fined employees that the matter had been referred to an attorney for collection, and the Union has filed some suits against employees to collect the fines. App. 8a. The Union's Constitution and By-Laws contain no provisions permitting its members to resign; in fact, it was the position of the Union before the Board that its members *cannot* resign from it. App. 40a, n. 11; 61a-62a; App. 72a.

It appears to be the position of the Union petitioner that once a strike vote has been taken, all of its members are bound to honor the picket line for the duration of the strike, without regard to the facts and circumstances surrounding the strike vote, and without regard to any and all subsequent events or circumstances.[29] Both the Board and the court below have specifically rejected this contention.[30]

In the event this Court should fail to answer the question presented in No. 71-1563 by The Boeing Company in the affirmative (see page 2, *supra*, and n. 30 herein), then this Court should also deny the review of the first question presented by the Union in No. 71-1417.

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[29] See, e.g., No. 71-1417, Petition, pages 2 and 12-14.

[30] See also App. 13a, n. 7, where the court below refused to reconsider or overrule *Allis-Chalmers*, stating "that it is not our function". The court further stated, "any argument for such reconsideration must be addressed to the Supreme Court itself". This has been done by The Boeing Company in No. 71-1563.

Aside from the significant factual distinctions between the instant case and the *Granite State* case, the rationale the Union apparently would seek to have this Court adopt is erroneous. It appears that the rationale applied by the Court of Appeals for the First Circuit is the rationale the Union would have this Court adopt. The position of the Union and that of the First Circuit completely ignores the language of this Court in *Scofield v. N.L.R.B., supra,* that Section 8(b)(1)(A) "leaves a union free to enforce a properly adopted rule . . . against union members *who are free to leave the union and escape the rule.*"[31] And with regard to *Allis-Chalmers,* the Board itself has observed, "The holding in *Allis-Chalmers* was carefully restricted to the facts of that case."[32]

If *Allis-Chalmers* is allowed to stand, then it stands for nothing more in this regard, than that a union did not commit an unfair labor practice by fining those of its *members* who violated a union rule by working during an authorized strike, and by seeking judicial enforcement of those fines. No where does the Act or the Court impose a *duty* upon a member to refrain from engaging in protected, concerted activities. The Board has correctly held that where a union's constitution is silent with regard to when and how a member may resign, the member may resign at any time. App. 40a; 15a, n. 10; 20a-22a. Moreover, as noted above (page 22), the collective bargaining agreement provided that once an employee becomes a member

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[31]394 U.S. 423, 430. See also 40a, n. 11.
[32]App. 40a.

of the Union he retains his membership only for the life of the contract term.[33] Since the resignations all occurred after the termination of the 1963-65 agreement and before the execution of the new contract, the maintenance-of-membership provision certainly does not limit the rights of the employees.[34] The Union, in the court below, sought to have that court supply language and facts not present in the instant case, but the court below properly and correctly declined to do so.[35]

It is further submitted that the "reliance theory" relied upon by the First Circuit Court in *Granite State* is erroneous as a matter of law,[36] and, in the alternative, if such reliance is not erroneous there as a matter of law, its application here would be erroneous because of the factual distinctions. The record here is void of any evidence as to whether the fined employees participated in the strike vote or as to how they voted. App. 18a, n. 17. The suggestion by the First Circuit in *Granite State* that mutual alliance, analogous to that found in charitable subscription situations, is implicit in all strike votes[37] flies in the face of all realities of life, but particularly with regard to labor and industrial realities of life. The analogy sought to be drawn by that circuit is destroyed by the crucial distinction between a charitable pledge and a vote in favor of a strike. In the former situation, the contributor is fully

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[33]App. 7a; 35a.
[34]App. 19a. See also *N.L.R.B. v. Granite State Joint Board*, 446 F. 2d 369, 372, C.A. 1, 1971.
[35]App. 16a-17a.
[36]446 F. 2d at 373.
[37]446 F. 2d at 372.

aware of the extent of his commitment. In the strike vote situation, however, a union member has no way of gauging the duration, the success or lack of success, or the cost of the strike to him.

The rationale applied by the First Circuit in *Granite State* would emasculate Section 7 from the Act. In fact, that court went so far as to find that the members who voted to strike had waived their right under Section 7 to refrain from union activities.[38] His rights under Section 7 of the Act are as vital to an industrial worker as are the First Amendment rights to a free society, and should be protected accordingly. The traditional test for waiver of a constitutional right is that the waiver must be made with sufficient awareness of the relevant circumstances and likely consequences[39] and must be a voluntary expression of choice.[40]

The instant case presents a good example of why the rationale of the First Circuit Court of Appeals is erroneous. Here, it is unlikely that any employee who voted to strike had any reason to believe that one week before the strike was to begin, the area in which he lived and the plant was located, would be ravaged and devastated by Hurricane Betsy.[41]

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[38]446 F. 2d at 372-3.

[39]See *Boykin v. Alabama*, 395 U.S. 238 (1969); *McCarthy v. United States*, 394 U.S. 459 (1969) *Brookhart v. Janis*, 384 U.S. 1 (1966); *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Patton v. United States*, 281 U.S. 276 (1930).

[40]See *Brady v. United States*, 397 U.S. 742, 748 (1970). See also *Machibroda v. United States*, 368 U.S. 487 (1962); *Waley v. Johnston*, 316 U.S. 101 (1942); *Chambers v. Florida*, 309 U.S. 227 (1940); *Kercheval v. United States*, 274 U.S. 220 (1927).

[41]See, e.g., App. 72a-73a.

The rationale of the First Circuit in *Granite State* is equally vulnerable on other grounds.[42] The purported analogy between a strike vote and enlistment in the military service[43] is equally inapposite to the facts of industrial life. The point argued by the Union and accepted by the Court of Appeals for the First Circuit ignores the fact that when one volunteers for military service he enlists for a specific period of time. However, neither in *Granite State* nor in the instant case did the Union tell the employees how long the strike would last. Perhaps a different situation would be presented here if the Union had said, "We will be on strike from September 16 to October 2, 1965." Then the employees would have known the duration of the strike, and would have been able to intelligently judge whether or not they could remain off their jobs for that duration. But such was not the case, nor could it have been. The Union was striking in support of its demands in the new contract. Neither the Union nor the Company, much less the employees, can predict how long such a strike would last.[44]

CONCLUSION

The Court should grant the petition for writ of certiorari filed by The Boeing Company in No. 71-1563, and conclude that a union committed an unfair labor practice under Section 8(b) (1) (A) of the Act and en-

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42 See ftn. 28, *supra*.

43 446 F. 2d at 372-3.

44 In *Granite State*, The Court did not reach the question of whether employees who did not participate in the strike vote were free to abandon the strike at any time, or whether their voluntary act in joining the union constituted such a "contract" as to bar such a claim. 446 F. 2d at 374, n. 8.

gaged in conduct to "restrain or coerce" employees in the exercise of their rights under Section 7 of the Act to "refrain from" concerted activities, where such union imposed fines on, and attempted to collect such fines from, employees who came through the Union's picket line, regardless of whether or not such employees had resigned their union membership and regardless of whether or not the fines related to the period before, or the period after, resignation. To do so would render moot the questions presented by the Board and by the Union. However, were this Court to decline to accede to this view, then it would appear that the court below correctly concluded that a union may not fine former members who have resigned for their post-resignation activities. Further, if this Court is going to permit unions to fine their members for exercising their rights under Section 7 of the Act to refrain from engaging or participating in a strike, the question of reasonableness of the amount of the fine is one which the Board must determine.

Respectfully submitted,

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October, 1972.

TABLE OF CONTENTS

AUTHORITIES CITED

CASES:

Page

MISCELLANEOUS:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1417

BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD AND THE BOEING COMPANY

No. 71-1607

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

THE BOEING COMPANY, AND BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 459 F.2d 1143 (Pet. 5a-33a).[1] The opinion of the

[1] "Pet." refers to the petition for a writ of certiorari of Booster Lodge No. 405 in No. 71-1417.

National Labor Relations Board is reported at 185 NLRB No. 23 (Pet. 34a-46a). A companion opinion of the National Labor Relations Board is reported as *David O'Reilly*, 185 NLRB No. 23, 75 LRRM 1008 (1970)[2] (Pet. 47a-67a).

JURISDICTION

The judgment of the Court of Appeals was entered on March 14, 1972 (Pet. 1a.). The petitions for writs of certiorari were granted on December 18, 1972. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board is empowered to determine the reasonableness of a court-collectible fine assessed by a union against a member for violating its valid rule against strikebreaking.

2. Whether, given a union constitution which prohibits a member from "[a]ccepting employment in any capacity in an establishment where a strike . . . exists", a member of a union may escape union discipline, exerted by the levy of a court-collectible fine, for violation of his union obligation to refrain from strikebreaking by resigning from his union subsequent to the commencement of a strike and engaging in strikebreaking after his resignation.

STATUTE INVOLVED

Section 8(b)(1)(A) of the National Labor Relations Act (29 U.S.C. § 151) and its proviso are at the statu-

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[2] Remanded to Board, *sub nom., David O'Reilly* v. *N.L.R.B.*, 82 LRRM 2073 (C.A. 9, 1972), to determine the reasonableness of a fine imposed for strikebreaking, Judge Browning dissenting. The reasoning in support of the remand is expressed in *Morton Salt Co.* v. *N.L.R.B.*, 82 LRRM 2066 (C.A. 9, 1972), Judge Browning dissenting.

tory matrix of the controversy. Section 7 of the Act accords employees *inter alia* "the right to refrain" from "concerted activities for . . . mutual aid or protection." Section 8(b)(1)(A) makes it an unfair labor practice for a union "to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7. . . ." A proviso to this prohibition states that "this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . ."

STATEMENT

I. The Strike

The Boeing Company operates a plant at New Orleans, Louisiana, known as the Michoud plant (A. 3). The production and maintenance employees at this plant are represented in collective bargaining by the Union and its parent, International Association of Machinists and Aerospace Workers, AFL-CIO (IAMAW) (A. 3-4). A single employer-wide collective bargaining agreement covers IAMAW-represented units at the Michoud plant and at other facilities of the Company located elsewhere in the United States (*ibid.*) About 1,900 production and maintenance employees work at the Michoud plant (Pet. 35a).

A collective bargaining agreement covering the IAMAW-represented units at the Michoud plant and other Company facilities was in effect from May 16, 1963 through September 15, 1965 (A. 3, Pet. 35a). No accord upon new contract terms was reached upon expiration of the agreement (A. 4, Pet. 35a). A lawful employer-wide strike over the economic issues in dispute, and picketing in support of the strike, began on

September 16, 1965 and ended on October 3, 1965 (A. 4, Pet. 35a; A. 57).

The strike was preceded by a union meeting at which a strike vote was taken (A. 69, 117, Tr. 21). The Constitution of the IAMAW provides that "a strike vote . . . shall be by secret ballot. In order to declare a strike, such vote must carry by a three-fourths majority of those present and qualified to vote" (A. 137). The Constitution further requires that no strike may be declared without the approval of the Executive Council of the IAMAW, except that, "In an extreme emergency, . . . the I.P. [International President] may authorize a strike pending the submission to and securing the approval of the E.C. [Executive Council]" (A. 136-138). The By-Laws of the Union provide that, "The approval of a strike, method of declaring a strike, and the settlement of a strike shall be in accordance with applicable provisions of the IAM Constitution" (A. 151).

A new agreement was reached on October 3, 1965, retroactive to October 2 (A. 4, Pet. 35a; A. 57). The strike and picketing, which lasted eighteen days, embraced the Michoud plant (A. 4, 20, n. 28, Pet. 35a).

The new 1965 agreement, like the old 1963 agreement, contained a union security provision known as maintenance of membership. Under this provision employees who are or become union members are required to maintain their membership during the contract term, but employees who are not members need not join if they give timely written notice that they do not desire to become members (A. 4, Pet. 35a; A. 154-158).

II. The Internal Union Definition of Improper Conduct of a Member and the Internal Union Procedure for Consideration of Alleged Offenses.

The Constitution of the IAMAW defines "improper conduct of a member" and establishes a full trial and appellate procedure to determine the existence and punishment of alleged offenses (A. 142-150).

Among the offenses defined as misconduct of a member is "Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission" (A. 5; 143). The Constitution provides that this offense, like other "actions or omissions" constituting "misconduct by a member," shall "warrant a reprimand, fine, suspension and/or expulsion from membership, or any lesser penalty or any combination of these penalties as the evidence may warrant after written and specific charges and a full hearing . . ." (A. 5, Pet. 36a; A. 142). Disqualification from holding office for a period not exceeding five years is expressly enumerated as a penalty (A. 147).

To institute a proceeding to determine the existence and punishment of alleged offenses, a member may prefer written charges of misconduct against another member, which shall be filed with the president of the Local Lodge who in turn serves a copy on the accused (A. 143). A trial committee is promptly convened, and its first task is to "conduct an investigation of the charges and decide whether there is sufficient substance to warrant a trial hearing being held" (A. 144). If trial is warranted, the accused is informed "of the charges against him and when and where to appear for trial," and "a reasonable time . . . to prepare his defense" is afforded (A. 144-145). "If a member fails

to appear for trial when notified to do so, the trial shall proceed as though the member were in fact present" (A. 145). "Both the plaintiff and the defendant shall have the privilege of presenting evidence and being represented either in person or by attorney (the attorney being a member of the I.A.M.A.W.)" (A. 145).[3] Full opportunity to be heard and defend is afforded (A. 145-146).

After the conclusion of the trial, the trial committee is required to "consider all of the evidence in the case and thereafter agree upon its verdict of 'guilty' or 'not guilty.' If the verdict be that of 'guilty,' the trial committee shall then consider and agree upon its recommendation of punishment" (A. 146). The trial committee reports its determination and reasons at the next regular meeting of the Local Lodge (A. 146-147). The trial committee first reports its verdict and reasons with respect to guilt or innocence, and its verdict is then "submitted without debate to a vote by secret ballot of the members . . . in attendance" (A. 147). If the members concur in a "guilty" verdict, "the recommendation of the committee as to the penalty" is submitted in a separate report and "voted on by secret ballot of the members then in attendance" (A. 147). "The penalty recommended by the trial committee may be amended, rejected, or another punishment substituted therefor" by the members (A. 147). The mem-

[3] Although not of record in this proceeding, the IAMAW's settled interpretation is "that the word 'attorney' means any member of the IAM, and he does not have to be a licensed lawyer or the member of any bar association." Record, *International Association of Machinists, Oakland Lodge No. 284 (Morton Salt Co.)*, Case No. 20-CB-1776, GC ex. 8, p. 2. See *Sawyers* v. *Grand Lodge, International Association of Machinists*, 279 F. Supp. 747, 756 (E.D. Mo., 1967).

bers may reverse a "not guilty" verdict of the trial committee, and impose the punishment they deem appropriate (A. 147).

The accused is promptly notified in writing of the decision with respect to his guilt or innocence and of the penalty imposed if found guilty. (A. 146-147). The accused or accuser may appeal to the International President of the IAMAW, who is empowered "to affirm or to modify or reverse, in whole or in part, the decision . . . , or to remand the proceeding for further trial . . . , or to impose any penalty or fine which he deems to be required, including expulsion" (A. 147-148). Successive appeals are provided from the decision of the International President to the Executive Council of the IAMAW, and from the decision of the Executive Council to the IAMAW convention, "or to the membership at large by submission" of the appeal "to . . . referendum . . ." (A. 148-150).[4]

III. The Imposition of Fines for Strikebreaking

Some 143 production and maintenance employees, who were members of the Union when the strike began, crossed the picket line and worked at the Michoud plant during all or part of the period of the strike (A. 5, Pet. 35a). Some 24 of these strikebreakers made no attempt to resign from the Union during the strike period (Pet. 35a). The remaining 119 strikebreakers did resign from the Union during the strike period (Pet. 35a). Of these 119, 61 resigned from the Union and returned to work *subsequent* to their resig-

[4] The sufficiency of this procedure was examined and upheld by the Court of Appeals for the District of Columbia Circuit in *I.A.M.* v. *Friedman*, 102 U.S. App. D.C. 282, 252 F.2d 846 (1958), cert. denied, 357 U.S. 926 (1958).

nation, and 58 resigned from the Union but returned to work *before* their resignation (Pet. 35a-36a and n.3).

The Union tried all employees who were members of the Union when the strike began who were known to have worked during the strike, and assessed a penalty against each found guilty of strikebreaking, without regard to whether the accused had resigned from the Union during the strike period or had started to work subsequent to his resignation (A. 4, 11 and n. 11; 126-127). In late October or early November 1965, the appointed trial committee notified each accused (1) that he had been charged with "Accepting employment . . . in an establishment where a strike . . . exists" in violation of the IAMAW Constitution; (2) that the trial committee "has met and feel there is sufficient evidence to hold a trial"; (3) that a trial of the accused had been set for the time and place specified in the notice; and (4) that "you have the right to have an attorney (the attorney being a member of the IAMAW) to defend you. Under the Constition, if you fail to appear when notified, the trial shall proceed as though the member were in fact present" (A. 6, Pet. 36a; A. 163).

The ensuing proceedings resulted in a "Not Guilty" verdict as to two accused, a "No Fine" disposition as to a third, and a "Mistrial" without retrial as to a fourth (A. 174, 81-82). The remaining accused were found guilty of strikebreaking but a different penalty was assessed against a particular accused depending upon the class within which he fell. Those accused who appeared before the trial committee, apologized, and pledged loyalty to the Union were in effect fined fifty percent of their strikebreaking earnings and disqualified from holding union office for varying periods (A.

6, Pet. 36a; A. 120-121, 130). The exact penalty assessed against the members of this class reads as follows (A. 164):

> The members of Local Lodge No. 405, IAMAW, have assessed the following penalty:
>
> 1. That you be fined $450.00. This fine to be suspended providing you pay 50% of your earnings while working during the strike, and agree to attend all regular meetings of this Lodge during the next twelve (12) months.
>
> 2. That you be denied the privilege of holding office in the IAMAW for the time stated at your trial. If you worked less than three (3) days—one (1) year; three (3) to ten (10) days—three (3) years; ten (10) days or more—five (5) years.

Those accused who did not appear for trial and were found guilty were fined $450 and disqualified from holding office for five years (A. 5, Pet. 36a; A. 122). The exact penalty assessed against the members of this class reads as follows (A. 165):

> The members of Local Lodge No. 405, IAMAW, have assessed the following penalty:
>
> 1. That you be fined $450.00.
>
> 2. That you be denied the privilege of holding office in the IAMAW for a period of five (5) years.

The full $450 fine was assessed against 108 individuals, and the 50-percent-of-strikebreaking-earnings fine against 35 individuals (Pet. 36a, n. 3). All were informed of their right to appeal the decision to the International President of the IAMAW (A. 6, n. 4; 164-165). No appeals were taken (A. 7, n. 4).

Payment of the fines has followed a checkered course. No $450 fine has been paid (Pet. 37a). Reduced fines have been paid in full in eighteen instances and in part in three instances (Pet. 37a; A. 173-174, 81-82). Payments have averaged $40 (Pet. 37a; A. 130), and payments in full have ranged from a low of $10, a mid-point of $54.80, and a high of $120 (A. 173-174, 81-82). On November 3, 1967, the Union wrote to some individuals who had been "fined 50% of the wages"; the Union stated that "your fine has yet to be paid in full", requested that the individual contact the Union "to discuss payment since we are now in the process of turning all fines over to our attorney for collection", and concluded that "Failure to do so could cause your fine to be increased to $450.00 as was noted at your trial" (A. 6, Pet. 37a; A. 166). On February 2, 1966, the Union's attorney had written to 91 individuals fined $450 requesting "immediate payment in full" and noting that "Your failure to respond promptly will require our filing suit against you . . ." (A. 6-7; 168, 81-82). Suit has been instituted against nine individuals in local courts to recover the $450 fine assessed against each (A. 7, Pet. 37a; A. 133-135, 175-176). The Company has undertaken the defense of these suits (A. 7). The outcome of the suits has not been determined (Pet. 37a.).

IV. The Board's Decision

The claim before the Board was that the Union restrained or coerced employees in the exercise of their right to refrain from concerted activity for mutual aid or protection in violation of Section 8(b)(1)(A) of the Act. The claim divided into two parts. First, although the Union's rule against strikebreaking is valid, the Union violated Section 8(b)(1)(A) by fining

its members in an *unreasonably* large amount for violation of the rule, and by seeking or threatening to seek collection of that allegedly unreasonable fine by court action. Second, independently of the reasonableness of the fine, the Union violated Section 8(b)(1)(A) by fining in any amount those persons who had resigned from the Union for that strikebreaking activity in which they engaged *subsequent* to their resignation.

The first claim—the reasonableness of the fine—was dismissed by the Board (Pet. 42a, n. 16). It relied for its rationale on its decision in *David O'Reilly*, 185 NLRB No. 22, 75 LRRM 1008 (1970),[5] which it issued on the same day as the opinion in this case. In *David O'Reilly*, one member dissenting, the Board held that, given the settled validity of a rule requiring members "to honor an authorized picket line" and the settled permissibility of punishing breach of the rule by "union fines (or court enforcement of same)", Congress did not intend "to have the Board regulate the size of these fines and establish standards with respect to their reasonableness" (Pet. 55a). Rather, related as it is to "the fairness of union discipline meted out to protect a legitimate union interest" (Pet. 57a-58a), the issue of the reasonableness of a fine is to be determined by a court in a proceeding to collect or set aside the fine. The "local courts are the more logical tribunals for the establishment of standards of reasonableness" (Pet. 55a).

The Board, one member dissenting, decided the second claim—pertaining to the situation of a person who had resigned from the Union—in favor of the

[5] Remanded to Board to determine reasonableness of fine, *sub. nom., David O'Reilly* v. *N.L.R.B.*, 82 LRRM 2073 (C.A. 9, 1972), Judge Browning dissenting. See, p. 2, n. 2, *supra*.

view that the Union violated Section 8(b)(1)(A) by fining a person who had resigned from membership for engaging in strikebreaking *subsequent* to his resignation. The premise of the Board's decision is that, while a member is bound to observe his union's valid rules during his period of membership, "the contract between the member and the union becomes a nullity upon his resignation. Both the member's duty of fidelity to the union and the union's corresponding right to discipline him for breach of that duty are extinguished" (Pet. 39a-40a). Accordingly, the Union "violated Section 8(b)(1)(A) of the Act by imposing disciplinary fines upon resigners from its ranks, for acts committed after their resignations" (Pet. 42a). However, as to those resigners who engaged in strikebreaking *before* their resignation, the Union retained "the right to discipline the employees for prior strikebreaking. The effect of these employees' resignations was only to extinguish the Union's future authority over them" (Pet. 43a).

Member Gerald A. Brown dissented from this branch of the Board's decision (Pet. 45a-46a). He would hold that resignation in the midst of a strike does not free a member to engage in strikebreaking; resignation should not be given effect to allow the member to shed his obligation of union fealty at the very moment that it matters most. He stated in part that (Pet. 46a):

> Each of the employees involved here, and in all other situations of which I am aware, was a member of the Union in all senses of the word before the strike began. Thus the fealty owed by a member to his union in effect came into play when the strike was authorized and began, and a "resignation" at that point was already a disloyal action

from the standpoint of the Union and his fellow members. Moreover, I cannot conceive of a case arising where a union would "fine" someone who had never been its member at all. It is only because the employees here were, in the eyes of the Union, and pursuant to the Union's constitution and by-laws, still Union members, that the fines would have any impact at all upon them. In this respect, whether employees are still members of the Union for purposes of imposition of a Union fine, the proviso to 8(b)(1)(A), in express terms, applies to a union's rules for acquisition or retention of membership.

V. The Decision of the Court of Appeals

On review, the Court of Appeals, in agreement with the Board, affirmed its conclusion that "the Union violated Section 8(b)(1)(A) of the N.L.R.A. by imposing fines upon employees, and by threatening or attempting enforcement of such fines, because of those employees' *post-resignation* conduct in working at the Company plant during the authorized work stoppage" (Pet. 21a). However, in disagreement with the Board, the Court of Appeals held that "it is clearly the obligation of the N.L.R.B. to resolve the question of reasonableness where such an issue is appropriately raised" (Pet. 25a), and it directed the Board on remand to determine "the questions relating to the reasonableness of the fines imposed by the Union" (Pet. 33a).

SUMMARY OF ARGUMENT

I

The Board holds that it is without power to determine the reasonableness of a court-collectible fine assessed by a union against a member for violating its valid rule against strikebreaking. The issue which this

holding presents is broader than its narrow statement. For, if power exists to evaluate reasonableness, it equally exists to judge any other claim of arbitrariness in the levying of a court-collectible fine. There is no principled basis for distinguishing among claims of irregularity. Accordingly, the core issue is whether the Board is empowered to oversee the internal administration of union discipline in the levying of a court-collectible fine to enforce a valid union rule.

1. The power to determine the reasonableness of a fine or the regularity of its imposition to enforce a valid union rule rests with the courts. To say that this question is also within the purview of the Board is to upset the existing allocation of function in overseeing the administration of union discipline. Reasonableness is a question for judicial determination under state law and the Labor Management Reporting and Disclosure Act. "Unless the rule or its enforcement impinges on some policy of the federal labor law, the regulation of the relationship between union and employee is a contractual matter governed by local law." *Scofield* v. *N.L.R.B.*, 394 U.S. 423, 426, n. 3 (1969). ". . . [S]tate courts, in reviewing the imposition of union discipline, find ways to strike down 'discipline [which] involves a severe hardship'." *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 193, n. 32 (1967). "The reasonableness of the fines is a matter for the state court to determine . . . ." *U.O.P. Norplex* v. *N.L.R.B.*, 445 F.2d 155, 158 (C.A. 7, 1971). In short, except as entry into the field is narrowly required to determine whether a union rule offends a policy of the National Labor Relations Act, regulation of internal union affairs is a field from which Congress has excluded the Board. *International Brotherhood of Boilermakers* v. *Hardeman*, 401 U.S. 233, 237-241 (1971).

2. To permit the Board to enter this field would entail intolerable risks of collision with state courts. States courts regularly and routinely adjudicate the reasonableness of union fines. Were the Board also empowered to determine this question, the Board in the same case might find a fine reasonable which a court might find unreasonable, or the Board might find a fine unreasonable which the court might find reasonable. Since both the Board and the court would be exercising independent jurisdiction, each as competent to act as the other, there would be no basis for according priority between them, nor would either be required to stay its hand in deference to the other. Each would operate concurrently and conflict in result would be resolved by the happenstance of which proceeding ended sooner in a determinative disposition. And if conflict were not resolvable in this way it would not be resolvable at all short of decision by this Court. For the Board surely does not sit as a supervisory tribunal to review or displace judicial judgments. Nor should it sit as a supplementary tribunal additional to the courts to adjudicate claims arising from administration of internal union discipline.

3. Under the statutory scheme of the National Labor Relations Act it is the Board's business to protect an employee's job rights but not his membership rights.

Short of invoking a union security agreement to require a member to pay his union dues and initiation fee, the "policy of the Act is to insulate employees' jobs from their organizational rights. Thus §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperilling their livelihood." *Radio*

Officers' Union v. *N.L.R.B.*, 347 U.S. 17, 40 (1954). The object of statutory solicitude is thus job rights. The employee is protected in his status as an employee against reprisal for engaging in or abstaining from concerted activity for mutual aid or protection.

That is one side of the coin. The other side is that, so long as the employee's status as an employee is left alone, the union may discipline the employee as a member for failure to perform a valid membership obligation, and the Union's exercise of its disciplinary authority is none of the Board's affair. As a member, therefore, the employee may be expelled, suspended, fined, reprimanded, or disciplined in other ways, and objection to the means or extent of discipline is the concern of tribunals other than the Board.

The Court of Appeals destroys this basic statutory distinction. It fuses detriment to the employee by impairment of his status as an employee through adverse action against him by his employer, on the one hand, and detriment to the employee by exertion of union discipline against him in his capacity as a member, on the other. Either action may hurt the employee in his pocketbook, but it is the source of the injury, not the fact of its occurrence, which is statutorily determinative. Injury wrongfully sought or exerted through the employer is remediable by the Board; injury wrongfully sought or exerted through internal union discipline is remediable by the courts. A claim that a union fine is excessive relates to the internal ordering of the relationship of the union and its members; its entertainment therefore belongs to the courts and not the Board. A claim of injury does not loose the Board like a pooh-bah to right all perceived evil regardless of the source and incidence of the harm.

4. It is not possible to preserve the statutory bar erected by the National Labor Relations Act against inquiry by the Board into the internal affairs of a union if the Board is to determine the reasonableness of a fine or the regularity of its imposition. It of course does not matter whether the Board gives a union a clean bill of health or finds shortcomings. For it is the fact of the inquiry, not what it turns up, that involves the Board in the union's internal affairs. It is just this involvement which the Act is designed to avoid.

Entanglement of the Board in internal union self-government, were it required to determine the reasonableness of a fine, is vividly illustrated by considering the import of the requirement that the available internal remedy be exhausted before relief is sought from other tribunals. Where an available union remedy is shunted, no extraunion tribunal should ordinarily consider in the first instance a question whose determination would distinctly benefit from full prior union scrutiny, which may be self-corrected if the claim is urged internally, and where forebearance would further the independent interest in union self-government. As Justice Harlan cautioned, "courts and agencies will frustrate an important purpose of the 1959 legislation if they do not, in fact, regularly compel union members 'to exhaust reasonable hearing procedures' within the union organization. Responsible union self-government demands, among other prerequisites, a fair opportunity to function." *N.L.R.B. v. Marine and Shipbuilding Workers*, 391 U.S. 418, 429 (1968) (concurrence).

Accordingly, if the Board is to be required to oversee union administration of internal discipline, the

exhaustion rule confronts the Board with two equally indefensible alternatives. The Board must either repudiate the principle of exhaustion of internal union remedies, and thus destroy a bulwark of union self-government. Or the Board must consider the sufficiency of such reasons as may be urged to excuse the failure to exhaust, and thus deeply involve itself in probing the interstices of a union's internal affairs. Either way the Board would be heavily in the business of regulating union self-government, a field from which Congress excluded it.

5. Section 8(b)(1)(A) of the Act and its proviso were enacted in 1947. The Board's consistent interpretation of the proviso, from the beginning to the present, is that it places the administration of union discipline to enforce a valid union rule outside its regulatory authority. It is of course settled that an agency's uniform construction of its own statute, especially a contemporaneous construction, "is entitled to great deference." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971). And in this case that "prior long-standing and consistent administrative practice must be deemed to have received congressional approval." *Fribourg Navigation Co.* v. *C.I.R.*, 383 U.S. 272, 283 (1966). For the Board's "interpretation of § 8(b)(1)(A) . . . was reinforced by the Landrum-Griffin Act of 1959 which, although it dealt with the internal affairs of unions, including the procedures for imposing fines or expulsion, did not purport to overturn or modify the Board's interpretation of §8(b)(1)." *Scofield,* 394 U.S. at 429. An administrative construction with these credentials should stand.

In sum, given the validity of the union rule which a court-collectible fine is levied to enforce, the reason-

ableness of the fine or the regularity of its imposition pertains to the internal administration of union discipline and is therefore outside the Board's regulatory authority.

II

The union constitution in this case explicitly prohibits a member from "[a]ccepting employment in any capacity in an establishment where a strike . . . exists . . ." (*supra,* p. 5). The members have thus by specific commitment mutually promised one another to refrain from strikebreaking. They have incorporated this promise in the bond which orders their relationship. Through their internal tribunals they have consistently and fairly interpreted their promise as a commitment which binds a member notwithstanding his resignation to abstain from strikebreaking for the future duration of an existing strike. The question thus presented is the reasonableness and validity of this interpretation.

According to the Board, in the absence of an explicit contrary restriction upon the effect of resignation, a member's resignation from his union in the midst of a strike frees him forthwith from his existing union obligation to refrain from strikebreaking in that strike for its future duration. It predicates this conclusion on its view that, as a matter of contract law, the "contract-constitution" "becomes a nullity" upon resignation, and *ipso facto* the "member's duty of fidelity to the union and the union's corresponding right to discipline for breach of that duty are extinguished" instanter (Pet. 39a-40a).

The Board's view of contract law is radically wrong. Treating the union constitution as a contract, it is

elementary that ascertainment of the existence, meaning and consequences of a promise depends as much upon implications of fact and operation of law as it does upon explicit terms. Fleshing out a contract so as to supply the unexpressed but fair and reasonable rule for the intentionally or inadvertently omitted situation is a commonplace in the interpretation of any agreement.

Given this orientation the question is whether a union constitutional provision barring strikebreaking is justly interpreted to mean, where it is silent upon the subject, that a mid-strike resignation frees the member forthwith from his existing union obligation to refrain from breaking the very strike which he was duty-bound to observe when it began. Allowance of strikebreaking is an impossible interpretation. In "every contract of association there inheres a term binding members to loyal support of the society in the attainment of its proper purposes . . . ." *Polin* v. *Kaplan,* 257 N.Y. 277, 177 N.E. 833, 834 (1931). This duty of loyal support finds its cardinal expression in the obligation to refrain from strikebreaking Every member depends on every other to withhold his labor from the struck employer in order to make the strike effective. The least that each member is entitled to expect of the other is that all who are pledged to the common cause at the beginning of the struggle will fulfill their obligation to carry through for its duration. Accordingly, a mid-strike resignation from a union, however efficaceous it may be to sever other membership obligations, cannot as a matter of the fair interpretation of the relationship be given the effect of relieving the resigner instanter of his duty to refrain from strikebreaking at the very moment when its observance counts most.

Contrary to the Board (Pet. 41a-42a), there is no "statutory policy" which militates against reading an explicit ban against strikebreaking to imply a continuing duty to refrain from strikebreaking during the existing dispute notwithstanding resignation. This Court held in *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 191 (1967), that Section 8(b)(1)(A) of the Act does not embrace "a prohibition against the imposition of fines on members who decline to honor an authorized strike and attempts to collect such fines." And it does not precisely because the "economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and 'the power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent . . .' " (*id.* at 182). This necessary maintenance of strike solidarity embraces within its natural scope disallowance of a mid-strike resignation to justify breaking the very strike which the member was duty bound to observe at its inception. The intrinsic nature of a strike commits a union member to stick with it for its duration, and it offends every concept of loyalty and duty to permit mid-voyage defection. The statute does not require a union to permit a mid-strike resignation to be used as an escape hatch to break the strike. The statute is no more hospitable to the strikebreaker-resigner than it is to the strikebreaker-member.

In short, a union constitution prohibiting strikebreaking, faithfully interpreted in keeping with its fair purport, bars treating resignation in the course of a strike as a license to engage in strikebreaking for the future duration of the existing strike, and "statutory policy" does not militate against this implication but is instead quite in harmony with it.

ARGUMENT

I. THE NATIONAL LABOR RELATIONS BOARD IS NOT EMPOWERED TO ASSESS THE REASONABLENESS OF A COURT-COLLECTIBLE UNION FINE IMPOSED TO ENFORCE A VALID UNION RULE AGAINST STRIKEBREAKING.

Narrowly stated the issue on this branch of the case is the validity of the Board's conclusion that it is not authorized to assess the reasonableness of a court-collectible union fine levied to enforce a valid union rule against strikebreaking. The issue, however, is not limited to the Board's power to decide whether a fine is excessive or temperate. For if power exists to inquire into the reasonableness of a fine it equally exists to inquire into any other asserted defect in the imposition of a fine, whether that defect be inadequate specification of charges, insufficient notice of hearing, deficient opportunity to adduce evidence, or any other procedural irregularity. In a word, the size of a fine is not a special, discrete, and confined issue. It is but one of numerous defects which can be asserted to invalidate a fine despite the substantive unassailability of the underlying rule it is designed to enforce. Accordingly, the core issue on this branch of the case is whether the Board is empowered to oversee the internal administration of union discipline in the levying of a court-collectible fine to enforce a valid union rule.

In support of the Board's conclusion that Congress has not reposed this power in it, we shall show that, (1) review of union administration of internal discipline is a judicial function, (2) entry of the Board into this field would bring it into collision with state and federal courts in the judicial discharge of this function, (3) exclusion of the Board from this field

is required by the statutory scheme of the National Labor Relations Act under which the Board's business is to protect an employee's job rights but not his membership rights, (4) inquiry by the Board into union administration of union discipline requires it to probe the internal affairs of a union, an area from which it is statutorily barred, (5) the Board's abstention is in keeping with its contemporaneous and uniform construction of its statute, and is therefore entitled to great weight, and (6) there is no merit in the reasons articulated by the Court of Appeals to support its contrary conclusion which it defends as "intuitively obvious . . . " (Pet. 24a).

A. Introduction: Focusing the Issue.

We begin by restating the immediately relevant statutory provisions. Section 7 of the Act accords employees *inter alia* "the right to refrain" from "concerted activities for . . . mutual aid or protection." Section 8(b)(1)(A) makes it an unfair labor practice for a union "to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7. . . ." A proviso to this prohibition states that "this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . ."

These provisions are brought into focus by three decisions of this Court in which it has considered the relationship of section 8(b)(1)(A) and its proviso to the administration of internal union discipline to enforce union rules: *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967); *N.L.R.B.* v. *Marine Shipbuilding Workers*, 391 U.S. 418 (1968); *Scofield* v.

N.L.R.B., 394 U.S. 423 (1969). This trilogy establishes two propositions and leaves a third undisturbed:

1. Resort to court to collect a reasonable fine imposed on a member for violation of a valid union rule does not violate the body of section 8(b)(1)(A) without regard to its proviso. In other words, the action taken does not constitute "restraint or coercion," and therefore there is no need to reach the proviso to exonerate the conduct.[6]

2. A union violates the body of section 8(b)(1)(A), and its action is not immunized by the proviso, when it imposes an internal union sanction to enforce a union rule which is invalid because it conflicts with an overriding policy of the National Labor Relations Act. In other words, neither the body of section 8(b)(1)(A), nor its proviso, countenances enforcement of the invalid rule.[7]

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[6] *Allis-Chalmers*, 388 U.S. at 192, n. 29 ("Our conclusion that § 8(b)(1)(A) does not prohibit the locals' actions makes it unnecessary to pass on the Board holding that the proviso protected such actions."); *id.* at 195 ("Thus this history of congressional action does not support a conclusion that the Taft-Hartley prohibitions against restraint or coercion of an employee to refrain from concerted activities included a prohibition against the imposition of fines on members who decline to honor an authorized strike and attempts to collect such fines."); *Scofield*, 394 U.S. at 436 ("... [T]he union rule is valid and ... its enforcement by reasonable fines does not constitute the restraint or coercion proscribed by § 8(b)(1)(A).").

[7] *Scofield*, 394 U.S. at 429 ("... [I]f the rule invades or frustrates an overriding policy of the labor laws the rule may not be enforced, even by fine or expulsion, without violating § 8(b)(1)(A)."); *Marine Workers*, 391 U.S. at 425 ("... [T]he proviso in § 8(b)(1)(A) that unions may design their own rules respecting 'the acquisition or retention of membership' is not so broad as to give the union power to penalize a member who invokes the protection of the Act for a matter that is in the public domain and beyond the internal affairs of the union.").

3. Since none of the three cases presented the question, the Court had no occasion to consider whether the Board is empowered to act in a situation in which a rule is valid but the fine to enforce it is imposed in an amount or manner said to be defective for some other reason. The trilogy therefore leaves undisturbed the Board's settled proposition that, given a valid rule, "the proviso to Section 8(b)(1)(A) immunizes a union from Board remedial action with respect to the enforcement of internal union rules by means other than job discrimination. . . . [T]he Act did not invest it [the Board] with authority to police the internal discipline of the union short of job discrimination."[8]

These three propositions focus the inquiry in this case. The Court in *Allis-Chalmers* authoritatively established the validity of a union rule requiring a member to refrain from strikebreaking.[9] The determination of the validity of this rule, like the determination of the validity of the production ceiling rule in *Scofield,* entailed no probe into a union's internal affairs. Rather the inquiry looked to the compatibility of the rule with the National Labor Relations Act. It simply tested the legality of the rule by external statutory criteria.

But, in this case, given the substantive validity of the rule against strikebreaking, the Board would be required to cross from external substantive validity into internal union administration were it to decide the

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[8] *Local 138, Operating Engineers (Skura),* 148 NLRB 679, 682 (1964).

[9] The Court on December 18, 1972, denied Boeing's petition in which it asked the Court to reconsider *Allis-Chalmers, Boeing* v. *N.L.R.B.,* No. 71-1563.

merits of the claim that the size of the fine imposed for violation of the rule was excessive. At issue, therefore, is the correctness of the Board's settled interpretation that Congress has not commissioned it to oversee union administration of internal discipline to enforce a valid rule.

B. Review of Union Administration of Internal Discipline Is a Judicial Function.

It is with the courts, not in the Board, that responsibility rests to oversee a union's internal affairs. Accordingly, to say that administration of union discipline to enforce a valid union rule is outside the Board's regulatory authority is of course not to say that it is beyond effective control. The reasonableness of a fine, and the procedural regularity of its imposition, are questions for judicial determination under state law and the Labor Management Reporting and Disclosure Act (the Landrum-Griffin Act hereafter cited as LMRDA).[10] The arbitrary imposition of union discipline is reached by the judicial route; it is therefore a fully remediable legal wrong.

This is no situation, accordingly, where a claim of arbitrariness must be determinable by the Board or not at all. Rather, the question is one of allocation of function—which tribunals pursuant to what laws have been invested with the responsibility of decision. And the answer, fully compatible with the overall scheme of union regulation, is that a claim of arbitrariness in the administration of union discipline is an issue for judicial determination under state law or the LMRDA, not by the Board under the National Labor Relations Act.

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[10] 73 Stat. 519, 29 U.S.C. § 401 (1959).

When Congress enacted section 8(b)(1)(A) in 1947, state courts had been adjudicating disputes over union administration of internal discipline for more than half a century.[11] A "body of law establishing standards of fairness in the enforcement of union discipline grew up. . . ." *Allis-Chalmers,* 388 U.S. at 182-183. There was no dissatisfaction with the efficacy or sufficiency of state judicial control within this field; section 8(b)(1)(A) was therefore not directed at any problem concerning union administration of internal discipline. The legislative history of "§ 8(b)(1)(A) contain[s] not a single word referring to the application of its prohibitions to traditional internal union discipline in general, or disciplinary fines in particular. On the contrary there are a number of assurances by its sponsors that the section was not meant to regulate the internal affairs of unions." *Allis-Chalmers,* 388 U.S. at 185-186. The upshot was, as this Court wrote in 1958, that "the protection of union members in their rights as members from arbitrary conduct by unions and officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied. The proviso to § 8(b)(1) of the Act states that 'this paragraph shall not impair the rights of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . .'" *International Association of Machinists* v. *Gonzales*, 356 U.S. 617, 620 (1958).

In 1959, Congress enacted the LMRDA, and by that statute for the first time "Congress did seek to protect union members in their relationship to the union by

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[11] Summers, *The Law of Union Discipline: What The Courts Do In Fact,* 70 Yale L.J. 175 (1960).

adopting measures to insure the provision of democratic processes in the conduct of union affairs and procedural due process to members subjected to discipline." *Allis-Chalmers,* 388 U.S. at 194. In particular, in section 101(a)(5) Congress established "safeguards against improper disciplinary action" in the following terms (73 Stat. 523, 29 U.S.C. § 411(a)(5)):

> No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

Thus Congress "enacted only procedural requirements to be observed" (*Allis-Chalmers,* 388 U.S. at 194), and by section 102 entrusted enforcement of these requirements to the federal district courts (73 Stat. 523, 29 U.S.C. § 412).

Accordingly, in view of its passage of the LMRDA in 1959, the "Eighty-sixth Congress was . . . plainly of the view that union self-government was not regulated in 1947." *Allis-Chalmers,* 388 U.S. at 194. And, while Congress in 1959 enacted procedural safeguards in the administration of union discipline enforceable by federal courts, and adopted as well a number of affirmative standards to assure democratic processes, it otherwise left this field still within the dominion of state law. "Unless the rule or its enforcement impinges on some policy of the federal labor law, the regulation of the relationship between union and employee is a contractual matter governed by local law." *Scofield,* 394 U.S. at 426, n. 3. ". . . [S]tate courts, in reviewing the imposition of union discipline, find ways

to strike down 'discipline [which] involves a severe hardship'." *Allis-Chalmers,* 388 U.S. at 193, n. 32.

Whether a particular fine is reasonable or excessive, or the manner of its imposition fair or arbitrary, calls into play no federal labor policy enunciated by the National Labor Relations Act; it presents no question for which the Act suggests a standard or for which the Board has expertise or aptitude. It is not the business of the Act or the Board. It is, instead, a question historically within the current of judicial experience, to be handled as a matter of state associational law as augmented by the LMRDA. In short, except as entry is narrowly required to determine whether a union rule offends a policy of the National Labor Relations Act, regulation of internal union affairs is a field from which Congress has excluded the Board. *International Brotherhood of Boilermakers* v. *Hardeman,* 401 U.S. 233, 237-241 (1971).

C. Entry of the Board into the Field of Internal Union Discipline Would Bring It into Collision with State and Federal Courts

To permit the Board to enter the field of internal union discipline would entail intolerable risks of collision with state and federal courts. Thus a member who objects to the imposition of union discipline may himself initiate judicial action in a state or federal court seeking relief from the sanction, or he may in a court suit brought by the union to collect a fine defend against the claim by contending that the fine was arbitrarily imposed. Either way judicial intercession to review the union's action is secured. For example, a New Jersey court enforced payment of a union fine levied against a member for crossing a picket line, but

reduced the amount of the fine from $750 to $500.[12] A California court reversed a summary judgment enforcing payment of fines ranging in sums from $42.15 to $523.99 for working during a strike, holding *inter alia* that there was a triable issue of whether "the fines were unreasonably large." [13] Another California court directed entry of judgment requiring payment of a fine of $299 for strikebreaking, observing that "it is settled law in this country that such a fine becomes a debt enforceable by the courts in an amount that is not unreasonably large." [14] A Maryland court upheld a judgment enforcing payment of a $500 fine for strikebreaking, noting that "a fine, to be judicially collectible, must be reasonable." [15]

Were the Board also empowered to adjudicate the reasonableness of the fine, the Board in the same case might find a fine reasonable which a court might find unreasonable, or the Board might find a fine unreasonable which the court might find reasonable. Since both the Board and the court would be exercising independent jurisdiction, each as competent to act as the other, there would be no basis for according priority between them, nor would either be required to stay its hand in deference to the other. Each would operate concurrently in accordance with the following principle:

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[12] *North Jersey Newspaper Guild Local No. 173* v. *Rakos*, 110 N.J. Super. 77, 264 A.2d 453 (N.J. Sup. Ct. App. Div. 1970), pet. for cert. denied, 56 N.J. 478, 267 A.2d 60 (1970).

[13] *L.A. Newspaper Guild, Local 69* v. *Armenta*, 73 LRRM 2078 (Cal. Sup. Ct. App. Dept. 1969).

[14] *Jost* v. *Communications Workers of America*, 13 Cal. App. 3d Supp. 7, 12, 91 Cal. Rep. 722, 725 (Cal. Sup. Ct. App. Dept. 1970).

[15] *Walsh* v. *Communications Workers of America*, 259 Md. 608, 614, 271 A.2d 148, 151 (Md. Ct. of App. 1970).

"Where the judgment sought is strictly *in personam,* for the recovery of money or for an injunction compelling or restraining action by the defendant, both a state and a federal court having concurrent jurisdiction may proceed with the litigation, at least until judgment is obtained in one court which may be set up as *res judicata* in the other." [16] Based on this principle conflict in result between Board and court would be resolved by the happenstance of which proceeding ended sooner in a determinative disposition.[17] And if conflict were not resolvable in this way it would not be resolvable at all short of decision by this Court. For the Board surely does not sit as a supervisory tribunal to review or displace judicial judgments. Nor should it sit as a supplementary tribunal additional to the courts to adjudicate claims arising from administration of internal union discipline.

This case illustrates the problem. Here the Union has brought separate suits against nine individuals in Louisiana courts to recover the $450 fine assessed against each (*supra,* p. 10). The defense that the fine is unreasonable or the manner of its imposition arbitrary is fully triable in the Louisiana courts. For the Board also to take the same issue in hand invites conflicting adjudication with the Louisiana courts and needless exacerbation of state-federal relations. Congress avoided this mischief by keeping the Board out of this field.

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[16] *Penn General Casualty Co.* v. *Pennsylvania,* 294 U.S. 189, 195 (1935). See also, *Ballantine Books* v. *Capital Distributing Co.,* 302 F.2d 17, 19 (C.A. 2, 1962).

[17] What constitutes a determinative disposition in one tribunal so as to conclude proceedings in another tribunal is itself so vexing a question that a rule of law which spares encountering it commends itself on that account alone. 1B Moore's Federal Practice, ¶¶ 0.416[3], 0.416[4], pp. 2251-2283 (1965).

The problem is similarly illustrated in *David O' Reilly,* 185 NLRB No. 23 (1970) (Pet. 47a-67a), the case in which the Board articulated its governing rationale. The record in that case shows that, after protracted judicial proceedings within the California court system, the union was awarded a judgment for $500 in its suit against O'Reilly to collect the fine levied against him for strikebreaking (R. 12, 19-25, 32-38). In those proceedings O'Reilly protested that "the fine of $500.00 [is] unusual, unwarranted, and completely unfair" (R. 23). But the California court rejected that plea. It ruled that "the fine of $500 is a reasonable fine . . ." (R. 32, 35, 38). The Board rightly refused the invitation to reverse that judicial determination and conclude inconsistently with it that the fine was unreasonable. Precisely as Congress intended, the Board avoided the mischief of conflicting adjudication with state courts and needless exacerbation of state-federal relations by keeping out of this field.

Finally, the basis of the Board's entry into the field would be altogether idiosyncratic. All agree that given a valid union rule, the Board has no authority to inquire into union administration of discipline to enforce the rule if the sanction imposed is expulsion from the union or such lesser penalties as suspension, debarment from holding union office for a specified time, exclusion from attending union meetings for a particular period, or reprimand.[18] And there is apparent unanimity of

[18] Mr. Justice Brennan writing for the majority in *Allis-Chalmers*: ". . . [T]he proviso to § 8(b)(1)(A) preserves to the union the power to expel the offending member" (388 U.S. at 183). Mr. Justice White concurring in *Allis-Chalmers*: ". . . [A] union may expel to enforce its own internal rules . . . 'Coercive' union rules

opinion that the Board does not have authority to inquire if the sanction imposed is a fine so long as that fine is enforceable only by expulsion for nonpayment.[19] Accordingly, the Board's point of entry, if it may enter at all, is the union's reservation of authority to secure payment of the fine by court action. But to predicate the Board's authority within the field on the court-collectibility of the fine would be altogether bizarre. The only reason for the Board's entry would be to make sure that the union would not recover a fine in an unreasonably large amount. But that is exactly what the court itself will make sure of before it enters

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are enforceable at least by expulsion" (*id.* at 197-198). And Mr. Justice White observed of Mr. Justice Black's dissent in *Allis-Chalmers* that it does "not question . . . the enforceability of coercive rules by expulsion from membership . . ." (*id.* at 198). Since expulsion is not a prohibited means of enforcement, it of course follows that suspension and other lesser means are not.

[19] Mr. Justice Brennan writing for the majority in *Allis-Chalmers*: "At the very least it can be said that the proviso preserves the rights of unions to impose fines, as a lesser penalty than expulsion, and to impose fines which carry the explicit or implicit threat of expulsion for nonpayment" (388 U.S. at 191-192). Mr. Justice Black dissenting in *Allis-Chalmers*: ". . . I have already indicated that the proviso to § 8(b)(1)(A) may preserve the union's right to impose fines which are enforceable only by expulsion and that expulsion was the common mode of enforcing fines at the time the section was adopted" (*id.* at 214). Member Frank W. McCulloch, dissenting in *David O'Reilly*, 185 NLRB No. 23 (1970), from the Board's conclusion that it was not authorized to assess "the reasonableness of the amount of a court-collectible fine," drew the following distinction: "I would reach a different conclusion where the only sanction invoked or threatened for nonpayment of the fine, is expulsion or suspension from union membership. For, regardless of the amount of a fine, its enforcement solely by such internal methods appears clearly to be privileged by the proviso to Section 8(b)(1)(A), except of course in a situation—not the one before us—where the reason for the fine offends some overriding statutory policy" (Pet. 58a, n. 24). See also, *Local 1255, IAMAW* v. *N.L.R.B.*, 456 F.2d 1214, 1217 (1972), discussed *infra*, p. 87.

judgment for the union. The Board is not needed to do the very job that the court will perform. Furthermore, the court's role is far more natural in the scope of its inquiry than the Board's would be. For a court will not only set aside a fine which is excessive but it will nullify any sanction which is inordinate. And in particular circumstances "expulsion of the members visits a far more severe penalty upon the member than a reasonable fine." *Allis-Chalmers*, 388 U.S. at 183.

Accordingly, truncated and dislocating, the Board's entry into the field would be harmful in the overall scheme of union regulation. Within the scheme, given a valid rule, a claim that a fine to enforce it has been imposed in an unreasonable amount or by arbitrary means is a matter for judicial determination under state law and the LMRDA, not by the Board under the National Labor Relations Act. "The reasonableness of the fines is a matter for the state court to determine . . . ." *U.O.P. Norplex* v. *N.L.R.B.*, 445 F.2d 155, 158 (C.A. 7, 1971).

D. Board Inquiry into Union Administration of Internal Discipline Requires the Board To Cross the Line from Protection of Job Rights, Which Is Its Province, to Protection of Membership Rights, Which Is Not.

Given the enforcement of a valid rule, exclusion of the Board from inquiry into union administration of internal discipline exactly fits the statutory scheme of the National Labor Relations Act. Under that scheme it is the Board's business to protect an employee's job rights but not his membership rights.

Short of invoking a union security agreement to require a member to pay his union dues and initiation fee, the "policy of the Act is to insulate employees'

jobs from their organizational rights. Thus §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperilling their livelihood." *Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17, 40 (1954). The object of statutory solicitude is thus job rights. The employee is protected in his status as an employee against reprisal for engaging in or abstaining from concerted activity for mutual aid or protection. The function of the Board is to safeguard the employee for his protected action or inaction in his status as an employee—in getting a job from an employer, in keeping a job with his employer, in being compensated for his work by his employer, and in enjoying the other emoluments of his work granted by his employer.

That is one side of the coin. The other side is that, so long as the employee's status as a employee is left alone, the union may discipline the employee as a membe for failure to perform a valid membership obligation, and the Union's exercise of its disciplinary authority is none of the Board's affair. As a member, therefore, the employee may be expelled, suspended, fined, reprimanded, or disciplined in other ways, and objection to the means or extent of discipline is the concern of tribunals other than the Board.

The Court synthesized this duality in *Allis-Chalmers*. Under the National Labor Relations Act, it held, "Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status." 388 U.S. at 195. We do not again rehearse the legislative history supporting

this synthesis which the Court fully reviewed in *Allis-Chalmers.* It is enough to recall its purport. The upshot of the history of section 8(b)(2) enacted in 1947—barring a union from causing or attempting to cause an employer to discriminate against an employee in his employment—came to this (388 U.S. at 184-185):

> It is significant that Congress expressly disclaimed in this connection any intention to interfere with union self-government or to regulate a union's internal affairs.
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> Congressional emphasis that § 8(b)(2) insulated an employee's membership from his job, but left internal union affairs to union self-government, is therefore significant evidence against reading § 8(b)(1)(A) as contemplating regulation of internal discipline.

The upshot of the history of section 8(b)(1)(A) and its proviso came to this (388 U.S. at 186, 191-192):

> . . . [T]here are a number of assurances by its sponsors that the section was not meant to regulate the internal affairs of unions.
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> . . . [I]t was not the intent of the sponsors in any way to regulate the internal affairs of unions.

Thus, in *Allis-Chalmers,* as put by the Court in *Scofield,* the "Court . . . essentially accepted the position of the National Labor Relations Board dating from *Minneapolis Star & Tribune Co.,* 109 NLRB 727 (1954) where the Board also distinguished internal from external enforcement in holding that a union could fine

a member for his failure to take part in picketing during a strike but that the same rule could not be enforced by causing the employer to exclude him from the work force or by affecting his seniority. . . ." 394 U.S. at 428. Accordingly, in the Board's words, the statutory regime does not bring the Board's authority into play as long as the union in its enforcement of a valid rule acts on "the status of a member as a *member* rather than as an *employee.*" *Scofield,* 145 NLRB 1097, 1104 (1964), affirmed, 394 U.S. 423 (1969) (emphasis in original). And in *Minneapolis Star,* which won the Court's endorsement, the Board identified the abnegating side of this statutory dichotomy in its statement that "the proviso to Section 8(b)(1)(A) precludes . . . interference with the internal affairs of a labor organization." 109 NLRB at 729.

The point of the statutory duality—the Board protecting job rights and other tribunals protecting membership rights—is not that union administration of internal discipline will not affect a member's work or pay. As in *Allis-Chalmers,* union discipline to enforce a union rule against strikebreaking means that a member may receive less in pay than he might otherwise want to earn. As in *Scofield,* union discipline to enforce a union rule against exceeding a production ceiling means that a member may receive less in pay than he might otherwise want to earn. Accordingly, the point of the statutory duality is not that union discipline may not affect work or pay. The point rather is the source from which the effect flows. If the effect on employment is the consequence of the administration of union discipline, the National Labor Relations Act is indifferent to it so long as the union rule is valid; on the other hand, if the effect is the consequence of action

by or pressure on the employer to deny employment or its prerequisites, it is then the concern of the National Labor Relations Act. The Board articulated the distinction as follows in *Scofield* (145 NLRB at 1104):

> Obviously, production and wages are related to jobs. Jobs are related to employees and employees may, if they so desire, be union members. A union rule that a *member* is subject to a fine if he exceeds a production ceiling does not mean that he is subject to such a fine as an *employee*. Nor does it mean that his employment status is affected so long as the Union does not attempt to exact payment of the fine by pressure on his employer or discrimination in his job opportunities. (Emphasis in original.)

This Court affirmed just this distinction. The prohibitions of "§ 8(b)(2) and § 8(a)(3) of the Act" are not implicated "because the union has not induced the employer to discriminate against the member but has merely forbidden the member to take advantage of benefits which the employer stands willing to confer. Those sections are not aimed at completely internal union discipline of union members, even though the discipline may result in the member's refusal to accept work offered by the employer. *Allis-Chalmers* makes this quite clear." *Scofield,* 394 U.S. at 436.

Accordingly, synthesing and preserving this statutory duality, the Court observed in *Scofield,* "As an employee, he may be a 'good, bad, or indifferent' member so long as he meets the financial obligations of the union security agreement . . . . But as a union member . . . he is subject to union discipline." 394 U.S. at 429, n. 5. Yet it is precisely this synthesis that the Court of Appeals unglues in this case by its thinly-veiled direction to the Board that, in determining the reason-

ableness of a fine, it should inquire into whether the amount of the fine unduly cuts into the rule-violating member's strikebreaking earnings and in that sense is said to impair his "employment status" (Pet. 29a-30a):

> One additional consideration is worthy of mention. In its original *Scofield* decision, 145 NLRB 1097, 1104 (1964), the Board expressly indicated that a union had no right to impose any penalty which would "impair the member's status as an employee." This prohibition against union disciplinary action adversely affecting an employee's employment status has been approved by the Supreme Court. *See N.L.R.B.* v. *Allis-Chalmers Mfg. Co., supra,* 388 U.S. at 195; *Scofield* v. *N.L.R.B., supra,* 394 U.S. at 423, 428. While this principle clearly prohibits a union from seeking the suspension or termination of an employee by his employer due to his strikebreaking, its implications may have further application which might be relevant to the present case. Where a disciplinary fine is unreasonably excessive, it may possibly affect the employee's employment status as adversely—and possibly even more adversely—as an illegally obtained employment suspension. On remand, the Board might also consider this protective policy of the Act in determining the reasonableness of the fines in question under Section 8(b)(1)(A).

By this finesse the Court of Appeals destroys the basic statutory distinction endorsed by this Court. It fuses detriment to the employee by impairment of his status as an employee through adverse action against him by his employer however induced, on the one hand, and detriment to the employee by exertion of union discipline against him in his capacity as a member, on the other. The employee may be hurt in his pocketbook by either action, but it is the source of the injury,

not the fact of its occurrence, which is statutorily determinative. Injury wrongfully sought or exerted through the employer is remediable by the Board; injury wrongfully sought or exerted through internal union discipline is remediable by the courts. The fact of injury does not loose the Board like a pooh-bah to right all perceived evil regardless of the limitations within which Congress has carefully cabined its authority. Accordingly, as Judge Browning accurately observed in dissent in *Morton Salt Co.* v. *N.L.R.B.*, 82 LRRM 2066, 2073 (C.A. 9, 1972), "Of course the union could not induce the employer to threaten the member with suspension or discharge as a means of collecting a fine, but this is true whether the fine is reasonable or unreasonable in amount. Absent some such conduct, the mere imposition of an unreasonably large fine would have no effect upon the member's employment status. The fine would be collectible, or would not, whether the employee retained his employment or left it."

E. Board Inquiry into Union Administration of Internal Discipline Would Bring It Deeply into Regulation of the Internal Affairs of Unions, An Area from Which It Is Statutorily Barred, and This Is Especially Apparent with Respect to the Requirement of Exhaustion of Internal Union Remedies, Whether the Board Is To Observe or Abrogate the Requirement.

It is not possible to preserve the statutory bar erected by the National Labor Relations Act against inquiry by the Board into the internal affairs of a union if the Board is to determine the reasonableness of a fine or the regularity of its imposition. It of course does not matter whether the Board gives a union a clean bill of health or finds shortcomings. For it is

the fact of the inquiry, not what it turns up, that involves the Board in the union's internal affairs. It is just this involvement which the Act is designed to avoid. To fail to give effect to this avoidance is to disregard the line which the Act draws. It bears remembering, as Judge Learned Hand cautioned, that "the 'policy' of any law may inhere as much in its limits as in its extent."[20] And the limit of this law bars the Board from probing a union's internal affairs.

The extent to which the limit would be hopelessly overstepped is evident from the factors which the Court of Appeals marshals for the Board's consideration in determining the reasonableness of a fine (Pet. 29a):

> The reasonableness of a fine would necessarily have to be determined in light of the circumstances leading to its imposition. Such factors as the compensation received by the strikebreakers, the level of strike benefits made available to the striking employees, the individual needs of the persons being disciplined, the detrimental effect of the strikebreaking upon the effectiveness of the strike effort, the length of time of the work stoppage, the strength of the particular union involved, the availability of other less harsh union remedies, and many other similar considerations would clearly be relevant.

There is no possibility of probing these imponderables without searching scrutiny into the union's internal affairs. But this is hardly all. For the probe cannot stop with assessing the size of the fine. There is no principled basis for not also evaluating any other claim

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[20] L. Hand, The Spirit of Liberty, 164 (Dilliard ed. Vintage Books, New York, 1959).

of arbitrary imposition of a fine additional to its asserted excessiveness. Everything must be laundered if anything is to be.

Not only does the Court of Appeals thus put the Board wholesale into the business of overseeing union administration of internal discipline, but it jettisons the requirement of prior recourse to internal union remedies, for it directs the Board to inquire into the reasonableness of the fines despite the failure of the members to exhaust their intraunion avenues of redress (Pet. 23a, n. 27). In this case, many members did not appear for trial at all; others who appeared for trial and were fined took no internal appeal from the adverse decision (*supra*, p. 9). Accordingly, those who did not appear for trial disregarded the internal union procedure altogether. Those who did appear for trial but did not appeal forewent the internal appellate opportunity for reversal or favorable modification. In sum, therefore, the internal union procedure was disregarded at its trial stage by many and at its appellate stage by all.

To direct the Board nevertheless to review the reasonableness of the fine when the internal union procedure for consideration of the issue has been bypassed conflicts with the requirement that the available internal remedy be exhausted before relief is sought from other tribunals. Exhaustion furthers the independent interest in union self-government, encourages the self-correction of claimed wrongs, and avoids extraunion oversight without the benefit of full prior union scrutiny. *Hodgson* v. *Local Union 6799, Steelworkers*, 403 U.S. 333 (1971). ". . . [C]ourts and agencies will frustrate an important purpose of the 1959 legislation

if they do not, in fact, regularly compel union members 'to exhaust reasonable hearing procedures' within the union organization. Responsible union self-government demands, among other prerequisites, a fair opportunity to function." Mr. Justice Harlan concurring in *N.L.R.B.* v. *Marine and Shipbuilding Workers,* 391 U.S. 418, 429 (1968). See also, *Falsetti* v. *Local 2026, United Mine Workers,* 400 Pa. 145, 161 A.2d 882 (1960).

The experience of the IAMAW shows that prior recourse to the internal union remedy is not ceremonial. We have reviewed the appeals taken from decisions of the IAMAW Local Lodges to the International President of the IAMAW for the two-year period beginning January 1, 1971. Forty-one appeals were taken. The International President affirmed the District Lodge in full in 22 cases, upholding seven not-guilty decisions, eleven guilty decisions, and four decisions not to prosecute the charges. The International President altered the District Lodge decision in 19 cases, reversing 11 guilty decisions, partly reversing and partly affirming two guilty decisions, suspending or moderating the penalty in four cases, increasing the penalty in one case, and ordering a retrial in one case.[21] Internal ap-

[21] In one case presently in litigation, in which the events preceded the study period, the International President reduced the fines of each of 11 strikebreakers from $1,000 to $100. *Production Electronic & Aero-Dynamic Lodge No. 1327, IAMAW,* 192 NLRB 1098, 78 LRRM 1099 (1971), pending on petition for enforcement before the Court of Appeals for the Ninth Circuit, *N.L.R.B.* v. *Production Electronic & Aero-Dynamic Lodge No. 1327, IAMAW,* No. 71-3068. During the study period, 15 appeals pertained to picketing or strikebreaking activity. The International President upheld nine guilty decisions, reversed two guilty decisions, partly reversed and partly affirmed three guilty decisions,. and suspended the penalty in one case.

pellate review is thus obviously meaningful. Furthermore, a written opinion is rendered in each case explaining the basis for the decision on appeal, so that any extraunion review is advantaged by an explicit statement of the reasons for decision.

Prior recourse to the internal union remedy as a precondition to external review is therefore critical both to union self-government and to informed extraunion oversight. As a Maryland court held in sustaining a judgment enforcing a $500 fine against a member for strikebreaking, "a union member must exhaust the remedies open to him under the union rules before he can seek aid from the courts unless the union procedure is procedurally or substantively inadequate, fraudulent, or otherwise arbitrary and illegal"; therefore a member who foregoes "adequate" union trial and appellate procedures and chooses instead "not to seek to protect . . . [his] rights within the Union procedures . . . cannot be heard in court to say that they are not effective to impose coercive discipline against him." *Walsh* v. *Communications Workers of America, Local 2336,* 259 Md. 608, 612, 613, 271 A.2d 148, 150, 151 (Md. Ct. of App. 1970).

Accordingly, if the Board is to be required to oversee union administration of internal discipline, the exhaustion rule confronts the Board with two equally indefensible alternatives. The Board must either repudiate the principle of exhaustion of internal union remedies, and thus destroy a bulwark of union self-government. Or the Board must consider the sufficiency of such reasons as may be urged to excuse the failure to exhaust, and thus deeply involve itself in probing the

interstices of a union's internal affairs.[22] Either way the Board would be heavily in the business of regulating union self-government, a field from which Congress excluded it.

To escape the horns of this dilemma, the Court of Appeals flatly rejects the exhaustion requirement as a matter of indifferent concern, holding that the "imposition of such a requirement in this case concerning the reasonableness issue would not . . . best serve the interests of justice or further the objectives of the N.L.R.A. The issue here involves public policy and thus transcends the pure internal affairs of the Union" (Pet. 23a, n. 27). But the requirement of exhaustion cannot be finessed by saying that the substantive issue "involves public policy." The doctrine of exhaustion has its source in a rule of judicial administration long and firmly established not only for internal union remedies but also in statutory administrative proceedings[23] and for contractual adjustment procedures created by collective bargaining agreements.[24] It is part of "public policy" to require prior recourse to the tribunals having initial responsibility for decision before per-

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[22] The deep incursion into a union's internal affairs requisite to deciding whether or not exhaustion should be required is illustrated by the discussion in Summers, *The Law of Union Discipline: What The Courts Do In Fact*, 70 Yale L.J. 175, 207-212 (1960); Summers, *Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049, 1086-1092 (1951).

[23] *E.g.*, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938).

[24] *E.g.*, *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1955); *Neal* v. *System Board of Adjustment*, 348 F.2d 722, 727 (1965) (opinion of Justice Blackmun).

mitting intercession by other ultimate reviewing bodies. The interest in orderly procedure which the exhaustion requirement serves is as exigent whether the substantive issue to be adjudicated is said to be "public," "private," or an admixture. There is nothing in the nature of a "reasonableness" issue which suggests that it is not suited to prior union scrutiny through the union trial and appellate procedures. On the contrary, the issue especially implicates close attention to particularities, which resist useful generalization, and would therefore uniquely benefit from full initial union examination.

Nor does this Court's decision in *N.L.R.B.* v. *Marine and Shipbuilding Workers,* 391 U.S. 418 (1968), invoked by the Court of Appeals, support its view (Pet. 23a, n. 27). *Marine Workers* holds that exhaustion is not required where the rule for whose violation discipline is imposed is itself invalid and the union procedure "plainly inadequate" (*id.* at 425). A rule against strikebreaking is of course valid, and the reasonableness of a fine for its breach is a question within the heartland of union self-government. Prior recourse to its procedures is hence obligatory if those procedures are adequate and fair. As Justice Blackmun has explained, with "internal remedies so definitely available, resort to them, or an adequate reason for failure so to do, is a prerequisite to equitable relief against the union or its officers . . . ." *Neal* v. *System Board of Adjustment,* 348 F.2d 722, 726 (C.A. 8, 1965).

To be sure, administration of the exhaustion rule would entwine the Board within the interstices of a union's internal affairs. And that makes the point precisely. For the import of this factor serves, not to justify jettisoning the exhaustion requirement, but to confirm that review of union discipline is not within

the Board's bailiwick. When the minimum cost of the Board's entry into the field is rejection of exhaustion and resulting major dislocation of accepted law pertinent to review of union discipline, the clear teaching is that working in this field is not the business of the Board.

F. The Board's Interpretation, Contemporaneously Adopted and Uniformly Followed, Is Entitled to Great Weight

Section 8(b)(1)(A) and its proviso were enacted in 1947. The Board's consistent interpretation of the proviso, from the beginning to the present, is that it places the administration of union discipline to enforce a valid union rule outside its regulatory authority. This was the design of the proviso in preserving "the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . ." ". . . [B]y including this *proviso* Congress unmistakably intended to, and did, remove the application of a union's membership rules to its members from the proscriptions of Section 8(b)(1)(A), irrespective of any ulterior reasons motivating the union's application of such rules or the direct effect thereof on particular employees."[25] The Board has "not been empowered by Congress to police a union decision that a member is or is not in good standing or to pass judgment on the penalties a

[25] *International Typographical Union*, 86 NLRB 951, 957 (1949), affirmed, 193 F.2d 782, 800-801 (C.A. 7, 1951). See also, *Minneapolis Star and Tribune Co.*, 109 NLRB 727 (1954); *Foundation Co.*, 120 NLRB 1453, 1466 (1958); *Allen-Bradley Co.*, 127 NLRB 44, 47 (1960), enforcement denied, 286 F.2d 442, 446 (C.A. 7, 1961), but court's opinion not acquiesced in by Board, *Scofield*, 145 NLRB 1097, 1102 (1964), and Board's decision affirmed, 394 U.S. 423 (1969); *Local 248, United Automobile Workers*, 149 NLRB 67 (1964), affirmed, 388 U.S. 175 (1967); *Independent Stave Co.*, 175 NLRB 156, 159 (1969).

union may impose on a member so long as the penalty does not impair the member's status as an employee."[26]

It is of course settled that an agency's consistent construction of its own statute, especially a contemporaneous construction, "is entitled to great deference." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971); see also, *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). And in this case that "prior long-standing and consistent administrative practice must be deemed to have received congressional approval." *Fribourg Navigation Co.* v. *C.I.R.*, 383 U.S. 272, 283 (1966). For the Board's "interpretation of § 8(b)(1)(A) . . . was reinforced by the Landrum-Griffin Act of 1959 which, although it dealt with the internal affairs of unions, including the procedures for imposing fines or expulsion, did not purport to overturn or modify the Board's interpretation of § 8(b)(1)." *Scofield*, 394 U.S. at 429. An administrative construction with these credentials should lead the Court to defer to the Board's interpretation.[27]

G. Analysis of the Reasons Identified by the Court of Appeals To Support Its Conclusion Justified by It as "Intuitively Obvious."

The Court of Appeals supports its conclusion on the ground that its correctness is "intuitively obvious . . ." (Pet. 24a). We turn to consider the factors which it identifies to fortify its intuition.

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[26] *Scofield*, 145 NLRB 1097, 1104 (1964), affirmed 394 U.S. 423 (1969).

[27] See also, *Trafficante* v. *Metropolitan Life Ins. Co.*, 41 U.S.L.W. 4071, 4073 (S.Ct. 1972); *United States* v. *City of Chicago*, 400 U.S. 8, 10 (1970); *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 417-418 (1945).

1. *Precedent:* The Court of Appeals states that the Board's conclusion that it is without power "is based upon a clear misconception of the law and the Supreme Court's relevant decisions" (Pet. 23a). For its view of the right reading of this Court's decisions it refers to the Court's advertence to a "reasonable fine" in *Allis-Chalmers,* 388 U.S. at 183, and in *Scofield,* 394 U.S. at 428, 436 (Pet. 23a-25a). But the Court of Appeals quite mistakes the meaning of the statements alluding to a "reasonable fine." These statements are all referable to the conclusion in both *Allis-Chalmers* and *Scofield* that the *body* of Section 8(b)(1)(A) had not been violated and for that reason there was no need to rely on the *proviso.* It is the *proviso* which bars the Board from inquiry into the reasonableness of a union fine, and neither *Allis-Chalmers* nor *Scofield* addresses the interpretation of the *proviso* as a limitation upon the Board's power.

Furthermore, as Judge Browning observed in dissent in *Morton Salt Co.* v. *N.L.R.B.,* 82 LRRM 2066, 2071-72 (C.A. 9, 1972), "[t]here are other reasons for the Supreme Court's reference to 'reasonable' fines. The most obvious is that there was no contention that the fines in *Scofield* were unreasonable. *See* 394 U.S. at 430. The same is true of *Allis-Chalmers. See* 388 U.S. at 192-193 n. 30. If the adjective was used with some purpose in addition to that of accurately stating the facts of the cases, it 'seems directed to enforcing courts, encouraging those courts to make an independent determination of the reasonableness of the fine in each case presented, in the same fashion as courts limit other union discipline which imposes a severe hardship.'"

In short, at most, all that can be drawn from the Court's adjectival advertence to a "reasonable" fine is that the Court, not presented with the question, reserved but did not resolve it. We do not think it is the fashion of this Court to decide an important issue by an equivocal aside.

2. *Logic:* The Court of Appeals reasons from the premise that section 8(b)(1)(A) of the Act does not bar a reasonable fine to the conclusion that it therefore impliedly prohibits "an unreasonably large fine . . ." (Pet. 25a). But the conclusion is not logically embraced by the premise. A rule against strikebreaking is valid. The minimum measure of a reasonable fine for violating a valid rule is that it may be sizable enough to compel complete compliance with the rule. There is no point to a fine that does not by its amount enforce full obedience to the rule. Entire restraint of strikebreaking thus inheres in the rule and its enforcement.

This means that a reasonable fine will operate as a total restraint against strikebreaking. That is its object. Accordingly, an "unreasonable" fine does not add to the restraint against strikebreaking that a "reasonable" fine itself exerts. The restraint already designedly exists. It is not, therefore, the fact of restraint that renders a fine unreasonable, but inequity for other reasons in the internal ordering of the relationship of the member to his union. Thus a fine may be too high because disproportionate to the character of the offense, the financial resources of the offender, the circumstances of the offense, the knowing or unwitting intent with which it was committed, adherence to or departure from past practice in the amount levied,

and other factors relevant to evaluating the appropriateness of the punishment. These factors are not unique to enforcement of a rule against strikebreaking but relate equally to assessing the acceptability of any discipline imposed for violation of any valid rule. It is, consequently, the reasonableness of union administration of internal discipline which is at issue. This issue is not the business of the Board and does not become its business just because the discipline happens to take the form of a court-collectible fine imposed for strikebreaking. Accordingly, as Judge Browning observed in dissent in *Morton Salt Co.* v. *N.L.R.B.*, 82 LRRM 2066, 2072-73 (C.A. 9, 1972):

> The necessary effect of a fine in any amount is, literally, "to restrain or coerce" a member to adhere to the union's anti-strikebreaking rule. Nevertheless, the *Allis-Chalmers* court held that as used in section 8(b)(1)(A) these words simply were not intended to include a prohibition against the imposition of fines on union members who violate such a rule.
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> A fine may be unreasonably high, but not because of its impact upon a union member's right to cross a picket line in violation of a union rule, or on the supposition that it affects his employment status. In a collection proceeding, a state court may find equitable reasons for refusing to enforce unnecessarily severe punishment (*NLRB* v. *Allis-Chalmers Mfg. Co., supra,* 388 U.S. at 193 n.32), but collection proceedings are not for the Board.
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> Since under Allis-Chalmers a fine which restrains a union member from working during a

strike is not an unfair labor practice, and since no other tenable theory of an unfair labor practice has been advanced in this case, the Board correctly ruled that it had no jurisdiction to consider the reasonableness of the fines.

3. *Uniformity:* While disclaiming that it is deciding that "union action for enforcement of disciplinary penalties is pre-empted by federal labor law" (Pet. 25a, n. 30), the Court of Appeals nevertheless states that "[t]here is something to be said for having the reasonableness of fines determined by standards that are as nearly uniform as national standards promulgated by the N.L.R.B. can be" (Pet. 27a). The apparent hope of the Court of Appeals is that, while state courts need not follow the Board's lead in exercising their independent adjudicatory authority, they may be persuaded to adopt whatever standard the Board may devise. This hope may or may not prove well-founded, but it would not result in real uniformity even if it were. As the factors marshalled by the Court of Appeals show (*supra*, p. 41), any standard that can be formulated must take into account so many variables that it must almost necessarily emerge as an empty generality rather than as a meaningful guide. Furthermore, even were the Board able to fashion a genuine standard that state courts would be inclined to follow, a uniform substantive rule cannot itself assure evenhandedness in actual application. For a " 'multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.' " *Amalgamated Association* v. *Lockridge*, 403 U.S. 274, 287 (1971). In this context to invoke uniformity is to pursue an illusion.

In its opposition to certiorari, Boeing drives the argument of uniformity to its logical conclusion by suggesting not only that the Board is empowered to decide the reasonableness of a fine, but that it is to exercise this authority to the exclusion of state power, invoking the doctrine of preemption to oust the states from this field (Br. pp. 12-15). But the logic of the argument serves only to expose the fallacy of the premise on which it rests. For, as we have seen (*supra*, pp. 26-40), there is no room for this version of the allocation of function—ouster of the States and centrality in the Board—within the regime that Congress has fashioned to oversee union administration of internal discipline.

". . . [T]he labor relations pre-emption doctrine finds its basic justification in the presumed intent of Congress" (*Amalgamated Association* v. *Lockridge*, 403 U.S. 274, 302 (1971); " '[t]he purpose of Congress is the ultimate touchstone.' " *International Brotherhood of Boilermakers* v. *Hardeman*, 401 U.S. 233, 239 (1971). Congress did not put the Board in the business of overseeing the administration of internal union discipline. Thus, in the adjudication of claims arising under the LMRDA presenting federal questions of the "fairness of an internal union disciplinary proceeding", this Court has held that Congress did not place these claims "within the exclusive competence of the National Labor Relations Board", but entrusted them instead to the keeping of the federal district courts as a judicial function. *International Brotherhood of Boilermakers* v. *Hardeman*, 401 U.S. at 237-241. And in the LMRDA, in demarcating an area of federal judicial control over internal union discipline, Congress was explicit in its preservation of state power

within this field. Thus, in section 103 of Title I of LMRDA, Congress provided that (73 Stat. 523, 29 U.S.C. § 413):

> Nothing contained in this title shall limit the rights and remedies of any member of a labor organization *under any State* or Federal *law* or before any court or other tribunal, or under the constitution and bylaws of any labor organization. [Emphasis supplied.]

Similarly, in section 603(a) of the LMRDA, Congress provided that (73 Stat. 540, 29 U.S.C. § 523(a)):

> Except as explicitly provided to the contrary, nothing in this Act shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization, or of any trust in which a labor organization is interested, under any other Federal law or *under the laws of any State*, and, except as explicitly provided to the contrary, nothing in this Act shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law *or law of any State*. [Emphasis supplied.]

Accordingly, in the field of internal union discipline, Congress has carefully and expressly maintained state power. It has avoided conflict by excluding the Board from this field, not vice versa. In short, " 'internal union matters' . . . [is] a subject the National Labor Relations Act leaves principally to other processes of law." *Amalgamated Association* v. *Lockridge*, 403 U.S. 274, 296 (1971). To say that the Board preempts this field is to turn governmental regulation of this subject upside-down. *Parish* v. *Legion*, 450 F.2d 821, 828-829 (C.A. 9, 1971); *Communications Workers of*

America, AFL-CIO, Local 9206 v. *Maloney,* 259 Or. 470, 486 P. 2d 1275 (1971).[28]

4. *Litigation expense:* The Court of Appeals suggests that it is less expensive for the employee to resolve the reasonableness-of-fine issue in an NLRB than a court proceeding, and the NLRB processes should therefore be available (Pet. 27a.). This is sheer makeweight. Power was withheld from the Board to adjudicate this issue because Congress concluded it was not the fit business of the Board. It does not become the Board's business because it would be less expensive for a particular litigant to invoke the Board's processes. Furthermore, nothing can save the employee the expense of a judicial proceeding. If the union sues to collect the fine the member must either incur the expense of a defense or default. He has no other alternative. For all of us "the expense and annoyance of litigation is 'part of the social burden of living under government.'" *Petroleum Exploration* v. *Public Service Commission,* 304 U.S. 209, 222 (1938). Finally, it is altogether a matter of legislative judgment whether the expense of litigation should be borne by the Government by entrusting an agency with the laboring oar, or should be placed on the losing litigant,

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[28] A simple observation exposes the utter fallacy of Boeing's position. If the issue of the reasonableness of a union fine were preempted by the Board, no state court would have jurisdiction to entertain a union's suit to collect a fine, for it would have no power to adjudicate an element essential to establishment of the claim. The Board itself lacks any authority to award the union a money judgment for the amount of the fine. The result would be that no tribunal would be empowered to entertain the union's action to collect a fine. This is an impossibility. *Communication Workers of America, AFL-CIO, Local 9206* v. *Maloney,* 259 Or. 470, 486 P.2d 1275 (1971).

or should lie where it falls regardless of the outcome. "... [E]conomic accessibility may be [a] valid policy reason . . . for a legislative grant of jurisdiction to the Board, but . . . [it] cannot furnish a basis for jurisdiction in the absence of such a grant." Judge Browning dissenting in *Morton Salt Co.* v. *N.L.R.B.*, 82 LRRM 2066, 2073, n. 3 (C.A. 9, 1972).

Accordingly, the reasons mustered by the Court of Appeals do not justify its conclusion. It upsets the allocation to the courts of the function of overseeing union administration of internal discipline, injects the Board into a field foreign to its statutory concern, destroys the exhaustion requirement in an area where its operation is especially fit, and discards a long-settled and consistent administrative construction. The nub of the matter on analysis remains rather as the Board put it in its governing decision in *David O'Reilly* (Pet. 57a-58a):

> The Board has long recognized that, as a practical matter, "virtually all union rules affect a member's employment relationship." However, given the legitimacy of the rule, the only question of relevance to the agency enforcing this Act is "whether, in enforcing the rule, the Union goes outside the area of union-membership relationship and enters the area of employee-employer relationship." The Union has not done so here, nor has it sought to vindicate a policy in conflict with the National Labor Relations Act, and the Act does not authorize this Board to evaluate the fairness of union discipline meted out to protect a legitimate union interest.

II. GIVEN A UNION CONSTITUTION WHICH PROHIBITS A MEMBER FROM "ACCEPTING EMPLOYMENT IN ANY CAPACITY IN AN ESTABLISHMENT WHERE A STRIKE . . . EXISTS", A MEMBER'S MID-STRIKE RESIGNATION FROM HIS UNION DOES NOT FREE HIM FROM HIS EXISTING UNION OBLIGATION TO REFRAIN FROM STRIKE-BREAKING IN THAT STRIKE FOR ITS DURATION.

In *N.L.R.B.* v. *Granite State Joint Board,* October Term 1972, No. 71-711, the Court held that, absent a limitation in the union constitution, a member is free to resign from his union and engage in strike-breaking subsequent to his resignation without incurring the liability of a court-collectible fine imposed by the union to discipline him for his postresignation return to work. The Court did not consider an initial membership vote to strike, or a later membership resolution subjecting any member aiding or abetting the employer during the strike to a $2,000 fine, to suffice as a restriction on resignation. The Court stated that "[n]either the contract nor the Union's constitution or bylaws contained any provision defining or limiting the circumstances under which a member could resign" (sl. op. p. 1). It observed that "[w]e have here no problem of construing a union's constitution or bylaws defining or limiting the circumstances under which a member may resign from the union" (sl. op. p. 3). It cautioned that "[w]e do not now decide to what extent the contractual relationship between union and member may curtail the freedom to resign" (sl. op. p. 4).

The question reserved in *Granite State* is presented in this case. The union constitution here explicitly prohibits a member from "[a]ccepting employment in any capacity in an establishment where a strike . . .

exists . . ." (*supra*, p. 5). The members have thus by specific commitment mutually promised one another to refrain from strikebreaking and have incorporated this promise in the bond which orders their relationship. Through their internal tribunals they have consistently and reasonably interpreted their promise as a commitment which binds a member notwithstanding his resignation to abstain from strikebreaking for the future duration of an existing strike.[29]

At the convention of the IAMAW in September 1972 the members have made this interpretation completely express. The prohibition against accepting employment in an establishment where a strike exists has in convention been amended, effective January 1, 1973, to provide that this ban survives resignation and endures for the future duration of an existing strike. The amendment to the union constitution reads that:

> Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout if the resignation occurs during the period of the strike or lockout or within 14 days preceding its commencement. Where observance of a primary picket line is required, resignation shall not relieve a member of his obligation to observe the primary picket line for its duration if the resignation occurs during the period that the picket line is maintained or within 14 days preceding its establishment.

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[29] *E.g., IAMAW* v. *N.L.R.B.*, 456 F.2d 1214 (C.A. 5, 1972); *Production Electronic & Aero-Dynamic Lodge No. 1327, IAMAW, AFL-CIO*, 192 NLRB No. 145, 78 LRRM 1098 (1971), pending on petition for enforcement, *sub. nom., N.L.R.B.* v. *Production Electronic & Aero-Dynamic Lodge No. 1327, IAMAW, AFL-CIO*, C.A. 9, No. 71-3068; *IAMAW, AFL-CIO, and Local Lodge 598 (Union Carbide Corp.)*, 196 NLRB No. 114, 80 LRRM 1079 (1972); *District Lodge No. 99, IAMAW, AFL-CIO (General Electric Co.)*, 194 NLRB No. 163, 79 LRRM 1208 (1972).

This amendment simply confirms the meaning which inheres in the preexisting promise to refrain from strikebreaking. While the amendment postdated the events in this case, it focuses the inquiry. We are required first to ask whether the preexisting commitment is fairly interpreted to bar postresignation strikebreaking, as is now explicitly provided. If it is, we are required next to ask whether the commitment, formerly implied and presently express, is lawful. Accordingly, we shall show (1) that a union constitution which bans accepting employment in an establishment where a strike exists, faithfully interpreted in keeping with its just purport, bars treating resignation in the course of a strike as a license to engage in strikebreaking for the future duration of the existing strike, and (2) that "statutory policy" does not militate against this implication but is instead quite in harmony with it.

A. Joining the Issue.

The Board holds that, in the absence of an explicit contrary restriction upon the effect of resignation, a member's resignation from his union in the midst of a strike frees him from his union obligation to refrain from strikebreaking in that strike for its future duration. The premise of this conclusion is that the obligations assumed upon the acquisition of membership subsist only during the period of membership and therefore terminate forthwith upon resignation. At the heart of this premise is the Board's concept of the "membership relationship" established by "a contract-constitution" to which the individual "becomes a party" upon "joining the union" (Pet. 39a). In the Board's view the contract-constitution "becomes a nullity" upon resignation, and *ipso facto* the "mem-

ber's duty of fidelity to the union and the union's corresponding right to discipline for breach of that duty are extinguished" forthwith (Pet. 39a-40a). To fortify its view as to the meaning of a union constitution as a matter of contract law, the Board draws upon the "statutory policy to prevent coercion of employees for exercising Section 7 rights" safeguarded against union encroachment by section 8(b)(1)(A) of the Act (Pet. 41a-42a).

It is thus the Board's thesis that, absent an express contrary stipulation, resignation results in blanket nullification of the applicability of the union constitution to govern the former member's future conduct for any purpose, and requires absolute and abrupt extinction of all existing obligations in total disregard of any circumstances. It is this thesis which we contest as fundamentally fallacious. Treating the union constitution as a contract, it is elementary that "the law of contracts attempts the realization of reasonable expectations that have been induced by the making of a promise,"[30] and that ascertainment of the existence, meaning and consequences of a promise depends as much upon implications of fact and operation of law as it does upon express terms.[31] Thus, although wanting in explicitness, a promise may nevertheless be "fairly . . . implied", for "the whole writing may be 'instinct with an obligation', imperfectly expressed."[32] And so, in

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[30] 1 Corbin, Contracts, 2 (1950).

[31] 3 Corbin, Contracts, 276-355 (1950).

[32] Cardozo, J., in *Wood* v. *Duff-Gordon*, 222 N.Y. 88, 90, 118 N.E. 214 (1917). See also, *Marrinan Medical Supply* v. *Ft. Dodge Serum Co.*, 47 F.2d 458, 463-465 (C.A. 8, 1931); *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 104-106 (1962).

"construing contracts, courts must look not only to the specific language employed, but also to the subject matter contracted about, the relationship of the parties, the circumstances surrounding the transaction, or in other words place themselves in the same position the parties occupied when the contract was entered into, and view the terms and intent of the agreement in the same light in which the parties did when the same was formulated and accepted." [33]

This Court just last term gave forthright expression to the indispensability of implication in determining the existence and meaning of a contract. ". . . [T]he law of contracts in most, if not all, jurisdictions long has employed a process by which agreements, though not formalized in writing, may be 'implied.' 3 Corbin on Contracts, §§ 561-672A. Explicit contractual provisions may be supplemented by other agreements implied from 'the promisor's words and conduct in the light of the surrounding circumstances.' *Id.*, at § 562. And, '[t]he meaning of [the promisor's] words and acts is found by relating them to the usage of the past.' *Ibid.*" *Perry* v. *Sinderman*, 408 U.S. 593, 601-602 (1972).

Given this orientation the question is whether the explicit union constitutional ban of strikebreaking is justly interpreted to mean, where it is silent upon the subject, that a mid-strike resignation frees the member forthwith from his existing union obligation to refrain from breaking the very strike which he was duty-bound to observe when it began. In "every contract of association there inheres a term binding members to loyal support of the society in the attainment of its proper

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[33] *Miller* v. *Miller*, 134 F.2d 583, 588 (C.A. 10, 1943).

purposes. . . ."[34] This duty of loyal support finds its cardinal expression in the obligation to refrain from strikebreaking. Every member depends on every other to withhold his labor from the struck employer in order to make the strike effective. The least that each member is entitled to expect of the other is that all who are pledged to the common cause at the beginning of the struggle will fulfill their obligation to carry through for its duration. Accordingly, a mid-strike resignation from a union, however efficacious it may be to sever other membership obligations, should not as a matter of the fair interpretation of the relationship be given the effect of relieving the resigner instanter of his duty to refrain from strikebreaking at the very moment when its observance counts most.

The issue that is thus joined is the interpretation of the postresignation reach of a specific ban of strikebreaking, and the influence of "statutory policy" in making and validating the interpretation.

B. This Court's Validation in Allis-Chalmers of the Imposition of a Court-Collectible Union Fine as a Discipline Against Strikebreaking.

We begin with this Court's decision in *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967) The Court answered "no" to the question "whether a union which threatened and imposed fines, and brought suit for their collection, against members who crossed the union's picket line and went to work during an authorized strike against their employer, committed the unfair labor practice under § 8(b)(1)(A) of the National Labor Relations Act of engaging in conduct 'to restrain or coerce' employees in the exercise of their right

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[34] *Polin* v. *Kaplan*, 257 N.Y. 277, 177 N.E. 833, 834 (1931).

guaranteed by § 7 to 'refrain from' concerted activities." 388 U.S. at 176.[35] Underpinning this holding was recognition that strikebreaking was fundamentally offensive to union solidarity essential to effective economic action (*id.* at 180, 181-182):

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by a majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. . . .
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> * * *
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> Integral to this federal labor policy has been the power in the chosen union to protect against erosion its status under that policy through reasonable discipline of members who violate rules and regulations governing membership. That power is particularly vital when the members engage in strikes. The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and "the power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent. . . ." Provisions in union constitutions and bylaws for fines and expulsion of recalcitrants, including strikebreakers, are therefore commonplace and were commonplace at the time of the Taft-Hartley amendments.

The "history of congressional action does not support a conclusion that the Taft-Hartley prohibitions against restraint or coercion of an employee to refrain from

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[35] See also, *Rocket Freight Lines Co.* v. *N.L.R.B.*, 427 F.2d 202, 205-206 (C.A. 10, 1970); *U.O.P. Norplex Division* v. *N.L.R.B.*, 445 F.2d 155 (C.A. 7, 1971).

concerted activities included a prohibition against the imposition of fines on members who decline to honor an authorized strike and attempts to collect such fines. Rather, the contrary inference is more justified in the light of the repeated refrain throughout the debates on § 8(b)(1)(A) and other sections that Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status" (*id.* at 195).

C. A Union Constitution Prohibiting Strikebreaking, Although Silent on the Subject of the Effect of Resignation, Cannot Reasonably Be Interpreted To Authorize Strikebreaking Subsequent to a Mid-Strike Resignation Where the Individual Was a Member of the Union at the Inception of the Strike, for the Implied Obligation of Loyalty Binds Him Notwithstanding Resignation To Refrain from Strikebreaking for the Duration of the Existing Strike.

Given the constitutional duty confirmed by *Allis-Chalmers* to refrain from strikebreaking, which every member assumes upon acquisition of membership, the question is whether resignation in the midst of a strike forthwith terminates that duty with respect to that very strike. The answer turns on whether the union constitution contemplates that a mid-strike resignation authorizes instant conversion of the duty to refrain from strikebreaking into a freedom to break the existing strike. It is to the last degree unimaginable that the union constitution is fairly capable of that interpretation.

The constitution is the union's charter of government. It orders the relationship of the union and its members to preserve and promote organizational effectiveness. A prominent organizational need is the ability

of the union to prosecute a strike. It is impossible to suppose, from the viewpoint of either the union as an institution or of any member as part of that institution, that the constitution allows desertion from the ranks in the midst of a strike. "... [N]egotiations are carried on with the prospect of an immediate or possible break of diplomatic relations and a resort to force. If the break comes the union goes to war and the need for discipline is obvious. The employer is the enemy; giving him any aid or comfort is treason. To supply him with labor is to furnish him the weapon with which the battle is fought and is clear treason." [36]

It is plain that the union constitution as the governing instrument cannot be reasonably interpreted to mean that a mid-strike resignation has the expected effect of authorizing the defector to break the existing strike. On the contrary, "derived from implied covenants of good faith and fair dealings" which inhere in every contract,[37] the least that the constitution contemplates is that the obligation to refrain from strike-breaking, undertaken before the strike and activated by it, shall endure for the duration of the strike.

The obvious escapes understanding only because the constitution is silent upon the effect of a mid-strike resignation. But silence presents the interpretative question; it does not decide it. Silence simply puts the trier to the task of extrapolating the probable meaning of the constitution based on the subject matter, rela-

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[36] Summers, *Disciplinary Powers of Unions*, 3 Ind. & Lab. Rel. Rev. 483, 489 (1950).

[37] *Local 1912, I.A.M.* v. *United States Potash Co.*, 270 F.2d 496, 498 (C.A. 10, 1959), cert denied, 363 U.S. 845 (1959).

tionship, and interests to be served in the light of the circumstances from which the problem emerges.

Fleshing out a contract so as to supply the unexpressed but fair and reasonable rule for the intentionally or inadvertently omitted situation is a commonplace in the interpretation of a collective bargaining agreement.[38] This interpretative function is no less a necessity, if perhaps less forthrightly recognized, in the interpretation of other contracts.[39] "Parties to a contract may, either intentionally or by oversight, omit certain terms or leave them to be determined in the future. When litigation ensues, the court, if it is not to frustrate the parties' dominant intent to make a contract, must often fill the gaps 'if it is possible to reach a fair and just result.' Although courts declare that they will not make a contract for the parties, they must frequently complete the contract by filling in the omitted terms. Such completion is, in a very real sense, an act of creation."[40]

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[38] *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-582 (1960). See also, *Perry* v. *Sinderman*, 408 U.S. 593, 602 (1972).

[39] Summers, *Collective Agreements and the Law of Contract*, 78 Yale L.J. 525, 529-530 (1969). "The notion that ordinary commercial contracts spell out all their obligations is a silly canard." Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1, 31 (1958).

[40] Summers, *supra*, at 551. ". . . [A] sound judicial tradition stresses concern for context, purposes, needs and consequences in resolving the ambiguities and the gaps that exist in all agreements. See, Llewellyn, *What Price Contract? An Essay in Perspective*, 40 Yale L.J. 704, 746 n. 86 (1931); *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459, 475-476 . . . (1960) (dissenting opinion)." Meltzer, *Labor Law, Cases, Materials, and Problems*, 746 (1970).

This approach is indispensable to the realistic reading of a union constitution. "Membership in a union contemplates a continuing relationship with changing obligations as the union legislates in a monthly meeting or in annual conventions. It creates a complex cluster of rights and duties expressed in a constitution. In short, membership is a special relationship."[41] We are required to ask whether that special relationship has during its pre-strike subsistence induced reliance on and created expectations of unity for the strike's duration so that the duty of loyalty inhering in the relationship should not in fairness be abruptly severed by a resignation in the midst of a strike. In considering that question there is no more room for dogmatic assertion that resignation must forthwith willy-nilly terminate all obligations flowing from the membership relationship than there would be for a cognate claim that divorce must automatically end all obligations flowing from the marriage contract.

The perspective which the Board lacks is provided by looking to what courts do when dealing with the termination of a contractual relationship. Thus, "where an exclusive franchise dealer under an implied contract, terminable on notice, has at the instance of a manufacturer or supplier invested his resources and credit in establishment of a costly distribution facility for the supplier's product, and the supplier thereafter unreasonably terminates the contract and dealership without giving the dealer an opportunity to recoup his investment, a claim may be stated."[42] So too, a "provi-

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[41] Summers, *Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049, 1056 (1951).

[42] *Clausen & Sons* v. *Theo. Hamm Brewing Co.*, 395 F.2d 388, 391 (C.A. 8, 1968). See also, Gellhorn, *Limitations on Contract Termination Rights-Franchise Cancellations*, 1967 Duke L.J. 465.

sion which would limit the termination rights of a party may be implied into the bargain under some circumstances."[43] Similarly, an agreement of indeterminate duration is terminable, but only after a reasonable lapse of time and upon reasonable notice.[44] Likewise, the liberty to quit employment is subject to the disability that in future employment the employee may not exploit the use of confidential information acquired in the former employment to the disadvantage of the former employer.[45] In like manner, resignation of a carrier from a shipping conference does not bar the conference from trying the carrier for preresignation infractions in accordance with *changed* procedures instituted *subsequent* to resignation.[46] Finally, just last term, in considering the status of a teacher whose employment was not protected by "an explicit tenure provision" and who had not been rehired for the next school year, this Court observed that "there may be an unwritten 'common law' in a particular university that certain employees shall have the equivalent of tenure" despite the absence of an "explicit tenure system . . . ."[47]

In all these situations the courts implied, or asserted the power to imply, just and reasonable conditions

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[43] *Clausen & Sons* v. *Theo. Hamm Brewing Co.*, 395 F.2d 388, 391, n. 3 (C.A. 8, 1968).

[44] *Miller* v. *Miller*, 134 F.2d 583, 588-589 (C.A. 10, 1943); *Boeing Airplane Co.* v. *N.L.R.B.*, 85 U.S. App. D.C. 116, 174 F.2d 988, 991 (1949).

[45] *N.L.R.B.* v. *I.L.G.W.U.*, 274 F.2d 376 (C.A. 3, 1960); *Junker* v. *Plummer*, 320 Mass. 76, 67 N.E.2d 667 (1946).

[46] *Pacific Coast European Conference* v. *F.M.C.*, 439 F.2d 514 (C.A.D.C., 1970).

[47] *Perry* v. *Sinderman*, 408 U.S. 593, 601-602 (1972).

upon the termination of the relationship which the agreement did not in terms express. No less is required in this case. Given the crucial expectation of utter membership solidarity during the critical period of a strike, and the rightful reliance of every member on every other to withhold his labor for the duration of the strike, a mid-strike resignation does not justly and reasonably comprehend lifting the existing duty to refrain from strikebreaking in the current controversy. The duty antedated the strike; observance of it was activated by the strike; performance should be required for the duration of the strike.

The Board in its decision is simply oblivious to these considerations; it neither recognizes nor confronts them. On its part, all that the Court of Appeals does is to assert that "it is generally recognized that courts will not usually imply offenses not specified in a union's constitution or bylaws" (Pet. 17a.). But this is a poor crutch. First, as the author whom the court cites to support its view makes clear, this stricture is limited to the innovation of a prescript in a situation where no rule at all exists; it does not apply to the interpretation of the scope of a rule which is in being.[48]

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[48] Summers, *Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049, 1060-61 (1951):

> The prevailing rule that a member may not be punished for implied offenses cannot be justified on the ground that it protects a member from being disciplined for conduct which he believes to be proper. When the conduct is as flagrant as in some of the cases mentioned, the member is fully aware that he has acted improperly. Furthermore, the rule gives little practical protection to union members. It does not compel unions to define punishable offenses and to specify the penalties to be inflicted. Instead, the gaps are filled by such vague catchalls as "disloyalty," or "conduct detrimental to the best

Second, even as so limited, the author disapproves the approach, observing that it permits a member to escape discipline although he "is fully aware that he has acted improperly", "gives little practical protection to union members", and serves instead merely to relieve judges of the task of judging.[49] Third, this Court has discredited the approach as a matter of federal law, as it emphasized in *International Brotherhood of Boilermakers* v. *Hardeman*, 401 U.S. 233 (1971). This Court concluded, upon an examination of the legislative history of section 101(a)(5) of the Labor-Management Reporting and Disclosure Act, that Congress deliberately declined to limit permissible discipline to violation of "a previously published, written union rule", or to miscreant conduct that "the union had proscribed prior to the union member having engaged in such activity" (*id.* at 242-244). The federal approach instead is to entrust unions with self-governing autonomy (*id.* at 242, 244-245):

> We find nothing in either the language or the legislative history of § 101(a)(5) that could justify . . . a substitution of judicial for union authority to interpret the union's regulations in order to determine the scope of offenses warranting discipline of union members.

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interest of the union." Union resolutions are made enforceable by including the offense, "disobedience to regulations, rules, mandates and decrees of the Local or International," and difficulties with penalties are eliminated by making all offenses punishable by fine, suspension, or expulsion.

The function of the rule against implied offenses is not nearly so much to protect the members, as it is to protect the courts. If the courts recognized implied obligations, they would have to determine what constituted a "serious offense."

[49] See preceding note.

> . . . § 101(a)(5) was not intended to authorize courts to determine the scope of offenses for which a union may discipline its members. And if a union may discipline its members for offenses not proscribed by written rules at all, it is surely a futile exercise for a court to construe the written rules in order to determine whether particular conduct falls within or without their scope.

Lastly, the discredited approach invoked by the Court of Appeals is dubious even as an accurate rendition of the common law. "It would seem that where a member's act is clearly in derogation of an obvious group interest, either because the group's dedication to particular ideas or goals is clear or because the member's act is especially hostile to more general group interests, the association could properly expel under a very vaguely worded rule, or indeed without any rule." Note, *Developments in the Law, Judicial Control of Actions of Private Associations,* 76 Harv. L. Rev. 985, 1018 (1963).

In short, if a union is to be faulted for construing its prohibition against strikebreaking to apply to a mid-strike resigner for the duration of the existing strike, it should be on a better basis than the invocation of an interpretative crutch which either refrains from exercising judgment or conceals the basis for it. Federal law is better served by candid confrontation of a problem than by seeking refuge in rote.

D. The Rule That, Where a Union Constitution Is Silent on the Subject of Resignation, a Member Is at Liberty To Resign at Will, Does Not Support the View That the Mid-Strike Resigner Is Free To Engage in Strikebreaking in the Existing Strike.

To support its view that a mid-strike resigner is free to engage in strikebreaking in the existing strike subsequent to his resignation, the Board apparently

invokes the rule that, where the union constitution is silent upon the subject, members are at liberty to resign at will (Pet. 40a and n. 11). But invocation of the rule to support strikebreaking is quite inapt. For the situation in which that rule has been applied is utterly different from the present situation, and regard for the difference bars application of the rule to sanction strikebreaking.

In all situations in which the Board has applied the rule, the question has been whether under a union security agreement known as maintenance of membership, by the terms of which a nonmember need not join the union but an existing member must retain his membership in the union, membership is required on the part of a person who had resigned from the union before the effective date of the agreement.[50] To that question the Board has answered that, as the union constitution did not limit the time or manner of resignation, a person ceased to be a member on resignation and therefore the agreement did not require membership of that person because he was a nonmember when it became effective.

Accordingly, all that the rule apparently invoked by the Board stands for is that, in the application of a maintenance of membership agreement, a person becomes a nonmember on resignation in the absence of a contrary specification in the union constitution. This

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[50] *Aeronautical Industrial District Lodge 751*, 173 NLRB 450, 452 (1968); *Local 340, International Brotherhood of Operative Potters*, 175 NLRB 756 (1969); *Local Union No 621, United Rubber Workers*, 167 NLRB 610 (1967); *New Jersey Bell Telephone Co.*, 106 NLRB 1322, 1324 (1953), enforced *sub nom. Communication Workers of America* v. *N.L.R.B.*, 215 F.2d 835, 838 (C.A. 2, 1954).

rule means that a member who resigns during a strike is not obligated to join a union under the terms of a maintenance of membership agreement entered into at the end of the strike because he had become a nonmember before the effective date of the agreement. But it means no more.

Considered in the context of its application, therefore, neither the rule nor any rationale supporting it persuasively relates to the question this case presents, namely, whether a mid-strike resignation frees the erstwhile member to engage in strikebreaking in an existing strike. It is one thing to say that a person becomes a nonmember on resignation so that an ensuing maintenance of membership agreement is not applicable to him. Or that a person becomes a nonmember on resignation so that he is no longer under a financial obligation to pay future dues and assessments to the union. It is quite another thing, however, to say that liberty to engage in strikebreaking in the current controversy is the reasonable and expected consequence of a mid-strike resignation. Only an either-or mentality, requiring that things must be all one or all another, can fail to consider whether the same act may not entail a diversity of consequences. Moderate interpretative sophistication encounters no strain in finding that a particular status may have different attributes for different purposes.[51] Accordingly, to say that a mid-strike resignation renders a subsequent maintenance of membership agreement inapplicable to the resigner is not to begin to say that it frees the resigner to engage in strikebreaking in the existing strike.

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[51] *E.g., Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 190-193 (1941); *District of Columbia* v. *Carter*, 41 U.S.L.W. 4127, 4128-29 (S. Ct. Jan. 10, 1973); *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 678 (1950).

E. The Board's Mistaken Reliance on Expressions in Opinions of This Court Said To Suggest the View That Instant Freedom To Engage in Strikebreaking Is the Necessary Consequence of a Mid-Strike Resignation.

The Board apparently takes the position that certain expressions in opinions of this Court suggest the view that instant freedom to engage in strikebreaking is the necessary consequence of a mid-strike resignation. We turn to this claim.

1. The Board states that this Court in *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 196-197 (1967), "expressly refused to pass on the legality of the imposition of a fine upon 'limited members' of the union", from which the Board deduces that "in this reservation there was the implication that such a fine when levied against nonmembers constitutes a form of restraint and coercion proscribed by Section 8(b)(1)(A)" (Pet. 40a). The Board deduces too much from too little.

In *Allis-Chalmers,* under one type of union membership available in that case, "an employee is required only to become and remain 'a member of the Union . . . to the extent of paying his monthly dues . . .' " (388 U.S. at 196). As to that type of limited member—one who has undertaken only to pay dues to the union—this Court stated that whether the prohibition of Section 8(b)(1)(A) of the Act "would apply if the locals had imposed fines on members whose membership was in fact limited to the obligation of paying monthly dues is a question not before us and upon which we intimate no view" (*id.* at 197).

To intimate no view as to whether a member whose obligation is limited to paying dues may be disciplined for strikebreaking is to intimate no reservation relevant to this case. A member whose union obligation is lim-

ited to paying dues is by negative implication a member who has not undertaken to fulfill any other obligation of membership; and it is surely arguable that a person who has not bound himself to refrain from strikebreaking cannot be fined for it. But we deal in this case, as the Court did in *Allis-Chalmers,* with persons who had full membership status (*id.* at 196-197),[52] and full membership embraces the obligation to refrain from strikebreaking (*id.* 181-182, *supra,* pp. 62-63). The question in this case, not presented in *Allis-Chalmers,* is whether a mid-strike resignation frees the full member to engage in strikebreaking in the existing strike. We have shown that it does not, and nothing in this Court's reservation concerning a limited member whose union obligation is confined to paying dues remotely suggests that it does.

2. In *Scofield* v. *N.L.R.B.,* 394 U.S. 423 (1969), this Court held that Section 8(b)(1)(A) of the Act did not bar a union from fining a member for violating a valid union rule against exceeding a production ceiling. In reaching this conclusion the Court noted *inter alia* that the rule was enforced against "union members who are free to leave the union and escape the rule" (*id.* at 430). According to the Board, "[b]y observing that members could 'leave the union and escape the rule,' the Court seems to have envisaged the possibility that union members could, indeed, resign membership and avoid discipline" (Pet. 41a).

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[52] An evidentiary showing is required to establish that a member has less than full membership status. As the Court stated, "Allis-Chalmers offered no evidence in this proceeding that any of the fined employees enjoyed other than full union membership. We will not presume the contrary." *Allis-Chalmers,* 388 U.S. at 196.

Since in *Scofield* the violation of the rule occurred during the term of a collective bargaining agreement, and since the union security clause in that agreement obligated an existing member to remain a member for the duration of the agreement (394 U.S. at 424, n.1), presumably the Court meant, when it said that "union members . . . are free to leave the union and escape the rule," that the member was free to renounce all union obligations except the payment of union dues. For a union security agreement, while it may do no more, may indubitably bind a person to pay union dues and initiation fees at the risk of losing his job if he does not. "Under § 8(a)(3) the extent of an employee's obligation under a union security agreement is 'expressly limited to the payment of initiation fees and monthly dues. . . . 'Membership' as a condition of employment is whittled down to its financial core.' "[53]

Accordingly, when the Court states that "union members . . . are free to leave the union and escape the rule," it envisages the member's exercise of his option during the contract term to convert from a full member (subject to all union obligations) to a limited member (subject only to the obligation to pay dues). But the option to convert to limited membership in *Scofield,* like the status of limited membership reserved in *Allis-Chalmers,* has nothing to do with the question that the instant case presents. Granted that a member may change from full to limited membership during the contract term, or may resign his membership altogether upon expiration of the contract, the question still remains of

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[53] *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.,* 388 U.S. 175, 197, n. 37 (1967), quoting from *N.L.R.B.* v. *General Motors Corp.,* 373 U.S. 734, 742 (1963).

the fair effect to be given to a mid-strike resignation as it relates to the rule against strikebreaking. The member by resigning of course escapes the rule against strikebreaking in any *future* controversy, but does that mean that resignation frees him from observance of the rule at least for the duration of the existing strike? Surely that question has not been answered—it has not even been broached—by the statement in *Scofield* that a member could escape observance of the production ceiling rule by leaving the union. There is a world of difference between a production ceiling rule and a strikebreaking rule, and therefore a world of difference in the time when leaving the union may fairly abrogate observance of the one rule but not the other. And it is just the demands of a strike situation, which the Court did not at all address in *Scofield,* which make the difference.

Accordingly, this Court's phrasal reference to "union members who are free to leave the union and escape the rule" (394 U.S. at 430) cannot be read with the indiscriminate openendedness that the Board attributes to it. It cannot mean that freedom to leave the union is absolute allowance to shed all existing obligation regardless of their preexisting inception, current activation, and continuing exigency in an unfinished situation.

3. The Board quotes from this Court's opinion in *N.L.R.B.* v. *Marine and Shipbuilding Workers of America,* 391 U.S. 418, 424 (1968), that "§ 8(b)(1)(A) assures a union freedom of self-regulation where its legitimate internal affairs are concerned." The Board then states that "the imposition of discipline upon nonmembers can hardly be deemed an internal affair" (Pet. 41a). The Board begs the question.

The effect to be given to a mid-strike resignation on enforcement of a rule against strikebreaking is surely part of a union's "legitimate internal affairs." If the union constitution had in terms stated that a mid-strike resignation does not relieve the member of his existing duty to refrain from strikebreaking in the current controversy, the union could hardly be faulted on the ground that it was legislating on a matter which was none of its internal business (*infra*, pp. 83-84). Just and reasonable regulation of the terms on which a member may resign is an obvious function of any membership association.

The Board's error lies in its unparticularized use of the word "nonmembers." The Board packages as "nonmembers" persons who have never been union members with persons who seek to resign their existing membership and assumes that both are to be treated alike. But the two are obviously not the same in fact, and whether for particular purposes they should be treated differently in law is the question presented. That question cannot be satisfactorily answered by question-begging assumptions as to the content of "internal affairs" or the fungibility of "nonmembers."

4. The upshot is that the quotations which the Board snips from the Court's opinions simply do not answer the present question. The present question is new. There is no point to the pretense that the answer has already been given.

F. The Suggestion That a Member Is Bound To Refrain from Strikebreaking for the Duration of the Strike Notwithstanding Resignation Only if at Its Inception He Individually Assented to the Strike.

The Court of Appeals holds that a member by resigning may renounce the institutional decision to strike at least in the absence of a showing that he individually

assented to the decision initially. But it suggests the possibility that a member is bound notwithstanding resignation to refrain from strikebreaking for the duration of the strike if at its inception the member individually supported the decision to strike (Pet. 18a-19a). This suggestion cannot withstand analysis. It is certain that the legal consequence of resignation cannot turn on whether or not the member at the inception of the strike individually supported or opposed the group decision to strike.

1. The essence of the solidarity indispensable to effective strike action is that a member is bound by the institutional decision to strike whether or not he was individually opposed to that group decision. A member is required to refrain from strikebreaking despite his dissent from the decision to strike. A member does not by his dissent create a personal option to refrain from striking by resigning. Membership is not divided into two classes, one class composed of those members who by individually assenting to strike are bound to that choice for the duration of the strike, and another class composed of those members who by individually dissenting from the strike are free to abandon the strike when and as they choose by resigning. The meaning of a union is that the contrariety of individual choice is forged into a single will once the group decision is taken. The reality of unified action is that each member is bound for the duration of the strike by the group decision to strike, whatever his own original personal choice, which he cannot escape by resigning.

In short, a member who remains a member but engages in strikebreaking is unquestionably subject to discipline for his infraction despite his individual dissent from the decision to strike. A resigner is in exactly the same posture.

2. To turn the allowability of strikebreaking subsequent to resignation on a showing of a member's individual original dissent from the strike decision is incompatible with the variety of means by which unions make strike decisions. Federal law does not, and state law cannot, prescribe the means by which unions make strike decisions (*International Union, United Automobile Workers* v. *O'Brien*, 339 U.S. 454 (1950)); indeed, federal law "does not require majority authorization for any strike" (*id.* at 458). Instead, the means by which strike decisions are made within a union are exclusively a matter of union self-government and internal organization. *N.L.R.B.* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349-350 (1958).

There are three principal methods by which strike decisions are made within a union: (a) by open vote of the members; (b) by secret ballot of the members; and (c) by the members' delegation of the strike decision to a strike committee or similar body. Only where the decision is made by open vote is it at all ascertainable what the member's original choice may have been, and even then the evidentiary problems of reliable after-the fact determination would be formidable. Where the decision is by committee, the member's only formal participation in the process is to designate the constituency of the committee; he does not himself vote. Where the decision is by secret ballot, the whole point of that method is that the member's individual vote shall not be known. Accordingly, when two of the three principal means by which strike decisions are made do not and cannot disclose the member's original individual choice, it is a practical impossibility to make the legal consequence of resignation turn on whether at the inception of the strike the member supported or opposed the strike decision.

3. The predominant means by which strike decisions within a union are made is by secret ballot.[54] The method required of its subordinate units by the IAMAW is typical. Thus, in this case, in order to authorize the strike, a strike vote by secret ballot was mandatory, a three-fourths majority vote in favor of the strike was necessary to call the strike, and the strike call was further dependent on having the sanction of the Executive Council of the International Union (*supra*, p. 4).[55]

As thus presented in the typical posture of the IAMAW's method of calling a strike, the heart of the question is whether the minority is bound by the majority's choice to strike made in a secret ballot election. The answer rests in the indispensability to effective labor action of binding the entirety of the members for the duration of the strike to the institutional decision to strike that the majority has made. And the essence of a secret ballot is its secrecy, a secrecy which must be broken if effect is to be given to the notion that a member is bound by the institutional decision only if he himself individually favored it when it was made. In short "the majority rules" (*J. I. Case Co.* v. *N.L.R.B.*, 321 U.S. 332, 339 (1944)), and within the compass of effective strike action there is no room for individual defec-

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[54] See the unpublished study, Collective Bargaining and Strike Provisions of National Union Constitutions, prepared for the use of the Federal Mediation and Conciliation Service by Herbert J. Lahne, a Department of Labor economist, reprinted at pp. 15a-20a of the appendix to the brief of the IAMAW as amicus curiae in *Granite State*.

[55] In 1970, the IAMAW amended its Constitution to require a two-thirds rather than a three-fourths majority vote to call a strike.

tion from the collective decision, whether or not the member was personally for or against the strike at its inception

G. There Is No "Statutory Policy" Which Militates Against Interpreting a Prohibition Against Strikebreaking as Requiring a Mid-Strike Resigner To Refrain from Strikebreaking for the Future Duration of the Existing Strike.

We return to our starting point. In this case, the provision of the IAMAW Constitution pursuant to which the resigners were disciplined proscribed "accepting employment . . . in an establishment where a strike . . . exists" (*supra*, p. 5). This provision does not specify whether or not it applies to bar strikebreaking in an existing strike subsequent to resignation. The Board would read the prohibition as a bar against "accepting employment . . . in an establishment where a strike . . . exists" *except* following resignation. The Union interprets it as a bar against "accepting employment . . . in an establishment where a strike . . . exists" *notwithstanding* resignation. As between the two rival interpretations of a union constitutional provision—one barring strikebreaking *except* following resignation and the other barring it *notwithstanding* resignation—the choice is obvious. A union constitution premised on maintaining strike solidarity simply cannot be rationally read to allow strikebreaking. We need hardly add that "Courts are reluctant to substitute their judgment for that of union officials in the interpretation of the union's constitution, and will interfere only where the official's interpretation is not fair or reasonable." *Vestal* v. *Hoffa*, 451 F.2d 706, 709 (C.A. 6, 1971), cert denied, 406 U.S. 934 (1972). See also, *International Brotherhood of Boilermakers* v. *Hardeman*, 401 U.S. 233, 241-245 (1971).

Insight may be afforded by looking at the issue as if the result for which we contend had been incorporated in the constitution in so many words, as it now indeed is (*supra*, p. 58). The constitution would then read, as it presently does, substantially as follows: resignation in anticipation or in the course of a strike shall not relieve the member from his duty to refrain from strikebreaking in the upcoming or existing strike. Such an explicit restriction would doubtless be given effect. A constitution may limit resignation to the manner and on the conditions prescribed, so long as the restrictions are just and reasonable.[56] To require that a present member refrain from strikebreaking in an existing or impending strike is obviously a just and reasonable restriction upon resignation.

In the absence of such explicitness, then, the question is whether the implication of that restriction better approximates the just and reasonable expectation of the parties than does the implication that resignation forthwith frees the erstwhile member to engage in strikebreaking. Since it is a union constitution that we are interpreting, and the imperative of a membership relationship which is at issue, it is perfectly patent that the implied terms on which the relationship may be dissolved fairly and reasonably contemplate that the existing obligation of loyalty to the union politic to refrain from strikebreaking shall at the least endure for the duration of the current controversy in which the en-

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[56] *N.L.R.B.* v. *International Union, United Automobile Workers*, 320 F.2d 12 (C.A. 1, 1963). Section 65(3) of the British Industrial Relations Act of 1971 provides that, "Every member of the organisation shall have the right, *on giving reasonable notice and complying with any reasonable conditions*, to terminate his membership of the organisation at any time." (Emphasis supplied.)

tirety of the membership is engaged and in which utter unity is indispensable.

But, says the Board, "statutory policy" is opposed to that implication (Pet. 41a-43a). The Court of Appeals similarly says that "an extremely important national policy militates against the imposition of such an implied obligation" (Pet. 17a). But neither is willing to commit itself to the view that an explicit restriction against strikebreaking in an existing strike subsequent to resignation would violate Section 8(b)(1)(A) of the Act. The Board on brief in *Granite State* contented itself with the statement that it "has not yet had occasion to consider whether a different accommodation would be warranted where the union's constitution or bylaws expressly limited the right of a member to resign during an ongoing strike" (p. 17, n.14). The Court of Appeals similarly expresses "no opinion . . . concerning the legality" of such a provision, and it likewise "intimate[s] no view regarding the legality of any such provision expressly imposing a continuing obligation on any resigning member to refrain from strikebreaking during a work stoppage which was properly commenced prior to the time of the resignation" (Pet. 20a, n.20).

This straddle will not do. The statute either does or does not allow a union to bind a mid-strike resigner to a duty to refrain from strikebreaking in an existing strike. If it does, no "statutory policy" is offended because the restriction is implied rather than express. A statute which countenances an express restriction does not permit the invention of a "statutory policy" which condemns an implied restriction. The Board and the Court of Appeals cannot shelter their ambivalence

"in that circumambient aura, so often euphemistically described as 'the policy of the statute.' "[67]

It is therefore necessary to face up to the question that the Board insinuates but does not choose to confront. And the answer is clear. An implied restriction against strikebreaking by a mid-strike resigner does not, any more than an explicit restriction would, run afoul of the bar of Section 8(b)(1)(A) against restraining an employee in the exercise of his right to refrain from strike activity conferred by Section 7 of the Act. This is inherent in the teaching of *Allis-Chalmers*. The Court held in *Allis-Chalmers* that Section 8(b)(1)(A) does not embrace "a prohibition against the imposition of fines on members who decline to honor an authorized strike and attempts to collect such fines" (*supra*, p. 64). And it does not precisely because the "economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and 'the power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent . . .' " (*supra*, p. 63). This necessary maintenance of strike solidarity embraces within its natural scope disallowance of a mid-strike resignation to justify breaking the very strike which the member was duty bound to observe at its inception. The intrinsic nature of a strike commits a union member to stick with it for its duration, and it offends every concept of loyalty and duty to permit mid-voyage defection. The statute does not require a union to permit a mid-strike resignation to be used as an escape hatch to break the strike.

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[67] L. Hand, J., concurring in *McComb* v. *Scerbo*, 177 F.2d 137, 141 (C.A. 2, 1949).

This conclusion is demonstrable by returning to the specific statutory premise on which *Allis-Chalmers* rests. The predicate of that decision is that imposition of a fine for violation of a valid union rule is not under any circumstances open to contest under section 8(b)(1)(A) if the fine is enforceable only by debarment from union membership for nonpayment. Writing for the majority, Mr. Justice Brennan stated that (388 U.S. at 191-192):

> At the very least it can be said that the proviso preserves the rights of unions to impose fines, as a lesser penalty than expulsion, and to impose fines which carry the explicit or implicit threat of expulsion for nonpayment.

The dissenters appear to share this view. Mr. Justice Black wrote for them, and while first seeming to reserve this matter (388 U.S. at 203), he finally stated that (*id.* at 214):

> . . . I have already indicated that the proviso to § 8(b)(1)(A) may preserve the union's right to impose fines which are enforceable only by expulsion and that expulsion was the common mode of enforcing fines at the time the section was adopted.

The issue which divided the Court in *Allis-Chalmers* was, not whether section 8(b)(1)(A) prohibited a fine that was enforceable solely by debarment from union membership, but whether court action to collect the fine was a permissible added sanction. The Court of course held that it was. "A lawsuit is and has been the ordinary way by which performance of private money obligations is compelled" (*id.* at 192).

The identical analysis is applicable to the strikebreaker-resigner as to the strikebreaker-member. If

the penalty imposed on the resigner were a fine, but if enforcement of the fine were limited to debarment of the resigner from reacquisition of membership in the union until the fine were paid, the sanction for nonpayment would be expressly privileged by the proviso to section 8(b)(1)(A), for it would be confined to "the right of the labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . ." In this situation, as the Court of Appeals for the Fifth Circuit has held, the "sanction for nonpayment of the fine was . . . confined to the 'acquisition or retention of membership,' a domain which is reserved to the Union under the Act" *Local 1255, IAMAW v. N.L.R.B.*, 456 F.2d 1214, 1217 (1972). The Fifth Circuit explained that (*ibid.*):

> We believe the Union's right to expel a member, or deny readmission to an ex-member, for not paying a fine is clearly protected by the proviso to § 8(b)(1)(A). The proviso makes no distinction between acts done while a member and those done while not a member. Either may be taken into consideration in determining who is to be admitted to membership or retained as a member. There is no doubt that the Union could have expelled . . . [the defector] unconditionally for strikebreaking. It seems that if the Union may absolutely bar him from membership it may conditionally bar him subject to the payment of a fine.
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> In summary, we hold only that a union member who resigns during a strike and crosses his union's picket line to return to work may be fined by the union for his postresignation strikebreaking when the fine is enforceable only by expulsion from the union.

The Board has since adopted the position and rationale expressed by the Fifth Circuit in this situation. *Pat-*

tern Makers' Assn. (Lietzaw Pattern Co.), 199 NLRB No. 14, 81 LRRM 1177 (1972).

At this juncture we reach the same point in the analysis that the Court confronted in *Allis-Chalmers*. As a fine for strikebreaking, enforceable by debarment from the union until the fine is paid, may be levied alike against the strikebreaker-member and the strikebreaker-resigner, the only question which remains is whether court action to collect the fine is a permissible added means of enforcement. The Court in *Allis-Chalmers* held that court enforcement of the fine was allowable against the strikebreaker-member, and there is no slightest reason why it should not also be allowable against the strikebreaker-resigner. In either case the "efficacy of a contract is precisely its legal enforceability. A lawsuit is and has been the ordinary way by which performance of private money obligations is compelled" (388 U.S. at 192).

We anticipate that we will be told on brief in this case, as we were told on brief in *Granite State*, that as a constituent of a member's "right" to refrain from strike activity, a member should be free to abandon the strike without risking union discipline for his defection, whenever the hardship of striking becomes greater than he cares to bear, so long as he is willing by resigning to give up the benefits of union membership; this is called "reasonable accommodation" (Bd. br. in *Granite State* pp. 17-18, 21). We call it strikebreaking. We are "accommodated" out of the means of enforcing discipline to maintain the strike solidarity essential to effective strike action. We are in the name of a "fair balance" required to favor the summer soldier and the sunshine patriot to the detriment of the steadfast striker who rightfully relied on group unity when

the strike was undertaken. And we are gifted with this cost-benefit analysis, not by the Board whose opinion will be searched in vain for it, but by "appellate counsel's *post hoc* rationalizations for agency action", a wholly impermissible basis on which to sustain administrative decision. *N.L.R.B.* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438, 442-444 (1965); see also *F.T.C.* v. *Sperry and Hutcheson Co.*, 405 U.S. 223, 245-250 (1972).

Indeed, were the Board to say that a mid-strike resignation must be given effect to allow subsequent strikebreaking, it would arrogate to itself a role which is statutorily denied it. A union's refusal to countenance a mid-strike resignation as an excuse for strikebreaking is a union's use of one part of its economic weaponry to secure satisfactory contract terms. To maintain that a union is required by law to tolerate mid-strike desertion through resignation is thus to assert the statutory power to divest the union of one means of waging economic warfare. Yet it is central to this statute that the Board has no such power. It is not to function "as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands"; it is not "to sit in judgment upon every economic weapon the parties to a labor contract negotiation employ . . . ." *N.L.R.B.* v. *Insurance Agents' International Union*, 361 U.S. 477, 497-498 (1960). The Board has no authority to "balance" away the union's or the employer's means of self-protection. *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300, 316-318 (1965); *N.L.R.B.* v. *Brown*, 380 U.S. 278, 290-292 (1965). Whether a union should continue or abandon a strike, and the weighing of hardship and advantage which enters into that

choice, is a decision to be made institutionally, and it destroys the very fabric of the union community to allow it to be unmade individually.

In short, when a union reads its prohibition against "accepting employment . . . in an establishment where a strike . . . exists" to bar strikebreaking in an existing strike subsequent to resignation, it is making an interpretation of the prohibition which is in utter harmony with its underlying purport. And when it is said that such an interpretation runs afoul of "statutory policy," the assertion bespeaks ignorance of what strike solidarity means and disrespects the limitation on the Board's power against intermeddling in the economic weaponry employed to wage economic warfare.

CONCLUSION

For the reasons stated the judgment below should be reversed and the case remanded to the Court of Appeals with directions (1) to affirm that part of the Board's order dismissing the portion of the complaint which rests on the alleged unreasonableness of the fines, and (2) to set aside that part of the Board's order granting relief which rests on the conclusion that the Union may not discipline postresignation strikebreaking by imposition of a court-collectible fine.

Respectfully submitted,

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February 1973